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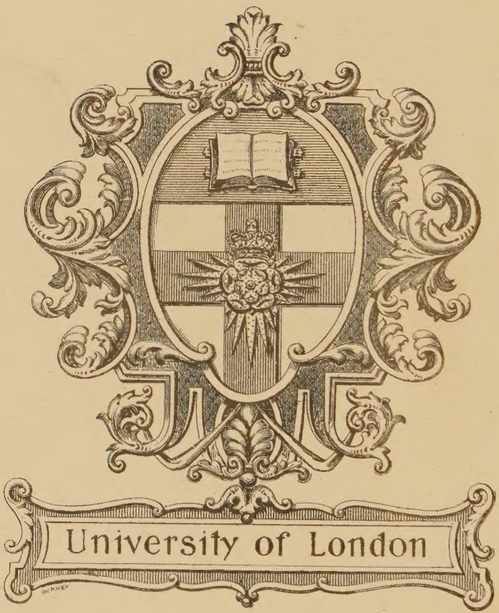
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CORRIGENDA.

P. 47. FRANCIS *v.* SQUIRE. At l. D 3 for "consistent" read "inconsistent" and at p. 48, l. D 5, for "in all other kinds of cases" read "in all kinds of other cases."

P. 71. WILKINSON *v.* CHETHAM-STRODE. At l. C 5 for "incidence" read "incidents"; at l. E 5 for "purpose of regulations" read "purpose by regulations"; and at p. 74, l. G 2 for "evoke" read "invoke."

P. 186. OSCAR HARRIS SON & CO. *v.* VALLARMAN & CO. Substitute "*Harold J. Brown* with him" for "for *Harold J. Brown* on war service."

P. 188. METROPOLITAN PROPERTIES CO., LTD. *v.* PURDY. At end of first paragraph of headnote for "creditors" read "accruing debts."

P. 193. HALL *v.* HALL. Counsel for respondent was *Roger Ormrod.*

P. 246. SKELT *v.* NORWICH BUILDING SOCIETY. At l. G for "defendant's" read "plaintiff's."

P. 275. GAMBLING *v.* BENHAM. The age of the girl in *Rose* v. *Ford* was 23 and not 19 as mentioned in the first two judgments.

P. 288. RUBIE *v.* FAULKNER. *D. R. W. Stevenson, Squires & Co.*, Cambridge, were solicitors for the appellant.

P. 295. ETTENFIELD *v.* ETTENFIELD. *J. L. Elson Rees* appeared with *J. B. Latey* for the appellant.

P. 403. R. *v.* DAY. *P. H. Thorold Rogers*, not *W. St. J. C. Tayleur*, was appearing for *Cyril Harvey*, on war service.

P. 448. ABINGDON BOROUGH COUNCIL *v.* JAMES. The first word on the page should be "prevent." At p. 451, l. 4, for "requested" read "required." At p. 453, l. 3, for "introduced" read "overlooked."

P. 486. NAAS *v.* WESTMINSTER BANK, LTD. In the third line of the editorial note read "does not execute it." The Halsbury reference is Vol. 10, p. 216, para. 270.

P. 531. *Re* GRIFFITHS. *Re* DAVIES' CONTRACT. *Wrentmore & Son* were agents for *P. H. R. Evans*, Bournemouth.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

ENGLISH AND SCOTTISH CO-OPERATIVE PROPERTIES MORTGAGE AND INVESTMENT SOCIETY, LTD. *v.* ODHAMS PRESS, LTD. AND ANOTHER.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 5, 6, 1939.**]

Libel and Slander—Libel—Statement reflecting on plaintiff in way of his trade or profession—Words true in ordinary meaning—Construction of innuendo—Headline in large type—" False profit return charge against society."

The plaintiffs, a society registered under the Industrial and Provident Societies Acts, were charged with making a return of income which was false in the sense that, without any suggestion of moral blame, it was, as a question of law, inaccurate. The defendants published an accurate report of the charge under a headline in large italic type " False Profit Return Charge Against Society." The plaintiffs pleaded an innuendo that those words meant and were understood to mean that the plaintiffs had deliberately falsified their accounts in order to deceive their members and the general public. At the trial before HUMPHREYS, J., the jury decided that the innuendo had been proved but awarded only a farthing damages. The plaintiffs appealed against the award of damages and the defendants cross-appealed on the ground that there was no evidence to be left to the jury contending that the words were not capable of the meaning alleged in the innuendo and were, in their natural and ordinary meaning, true :—

HELD : (i) the words were capable of the innuendo alleged and the matter was, therefore, properly left to the jury.

(ii) the jury having decided that the defamation alleged in the innuendo had been proved, the award of one farthing damages was wholly insufficient. There must, therefore, be a new trial limited to the assessment of damages.

[**EDITORIAL NOTE.** The effect of a publication of libellous words may be aggravated by the type in which they are printed and the place in which they are inserted in a newspaper. The modern newspaper has developed a headline printed in large type and running across the entire width of the page. Such headlines must often be very condensed and make use of the minimum number of words. The present case considers how these matters affect the libellous nature of such words and more particularly the extent to which such matters may justify an innuendo.

AS TO INNUENDO, see HALSBURY, Hailsham Edn., Vol. 20, pp. 425-433, paras. 511-520 ; and FOR CASES, see DIGEST, Vol. 32, pp. 64-67, Nos. 912-952.]

Cases referred to:

(1) *Tolley* v. *Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333; Digest Supp.; 100 L.J.K.B. 328; 145 L.T. 1.

(2) *Nevill* v. *Fine Art & General Insurance Co.*, [1897] A.C. 68; 32 Digest 72, *1010*; 66 L.J.Q.B. 195; 75 L.T. 606.

(3) *Capital & Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; 32 Digest 21, *121*; 52 L.J.Q.B. 232; 47 L.T. 662. A

(4) *Sturt* v. *Blagg* (1847), 10 Q.B. 906; 32 Digest 72, *1011*; *affg.* (1846), 10 Q.B. 899.

(5) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 32 Digest 170, *2086*; 61 L.J.Q.B. 535; 66 L.T. 794.

(6) *South Hetton Coal Co.* v. *North-Eastern News Assocn.*, [1894] 1 Q.B. 133; 32 Digest 148, *1795*; 63 L.J.Q.B. 293; 69 L.T. 844. B

(7) *Draper* v. *Trist*, [1939] 3 All E.R. 513; Digest Supp.

(8) *Sutherland* v. *Stopes*, [1925] A.C. 47; 32 Digest 142, *1739*; 94 L.J.K.B. 166; 132 L.T. 550.

APPEAL by the plaintiffs from the verdict and judgment at the trial of an action before HUMPHREYS, J., and a special jury in the King's C Bench Division on July 11, 1939, and cross-appeal by the defendants. The defendants published in their newspaper, the DAILY HERALD, an announcement that the plaintiff company had been convicted before magistrates of making a return in which they wrongfully stated their profits. The plaintiffs admitted that the paragraph contained nothing D that was not literally true and omitted nothing relevant, but said that the manner in which the information was presented—namely, by the use of large headlines—conveyed the meaning that the company had deliberately falsified their accounts with intent to deceive, and had carried on their business by dishonest methods, and other defamatory E meanings. In summing up, the judge left the evidence in support of the innuendo to the jury. On the quantum of damages, he directed the jury that the plaintiffs claimed no special damage but that the law always assumed that a defamatory libel might have caused the plaintiff some damage. The jury returned a verdict for the plaintiffs, finding that the F libel bore all the meanings attributed to it in the innuendo. They asked the judge whether they were bound to award damages, and his Lordship replied that they were, but that they were not bound to award any particular sum. They thereupon awarded one farthing damages. Counsel for the defendants thereupon applied to the judge to disregard the finding G of the jury, to rule that there was no evidence upon which they could possibly have arrived at their verdict, and to say that to award one farthing damages on the facts which they found was a compromise verdict based on a complete misunderstanding of the matters before them. Counsel for the plaintiffs maintained that the damages were irrelevant, H and that he had only to satisfy the jury that the words bore the meaning in the innuendo. He contended that he need not call any evidence as to their meaning. The judge, giving judgment on this application, said that the admission that the words were literally true was not conclusive. Circumstances were conceivable in which true words might be defamatory.

There was material upon which the jury were entitled to conclude that the article made an attack upon the company, that one or more of the allegations in the innuendo were proved, because of the way in which the statement made in the newspaper would be understood by the ordinary reader, and that the impression on the mind of the ordinary A reader would be that the company had done something very discreditable. He gave judgment for the plaintiffs without costs. The defendants appealed and the plaintiffs cross-appealed.

Valentine Holmes and *Hugh Holmes* for the appellants.

H. St. John Field, K.C., and *C. N. Shawcross* for the respondents.

B *Valentine Holmes :* As the jury found that the words meant that the plaintiffs deliberately falsified their accounts, and as the defendants made no suggestion reflecting upon the integrity or stability of the company, the award of one farthing damages showed either that the jury must have taken into consideration matters which they were not entitled C to consider, or that they were misled by the summing up and interlocutory observations of the judge. The judge should have told the jury that the law assumed that a man who has been libelled must, not might, have suffered damage : FRASER ON LIBEL AND SLANDER, 6th Edn., p. 34, *Ratcliffe* v. *Evans* (5), *South Hetton Coal Co.* v. *North-Eastern News* D *Assocn.* (6) and *Draper* v. *Trist* (7). [Counsel was not called on to reply on the cross-appeal.]

Field, K.C. : The words were literally true in their natural and ordinary meaning. When words are true, they cannot be made a libel by innuendo : *Capital & Counties Bank* v. *Henty* (3), *Nevill* v. *Fine Art & General* E *Insurance Co.* (2) and *Sutherland* v. *Stopes* (8). The judge ought not to have left the case to the jury.

Shawcross : Where the trial judge has held that the words are capable of a defamatory meaning and the jury have found that they bear a defamatory meaning, the defendant is not obliged to satisfy this court F that the words were not capable of bearing a defamatory meaning. He has only to show that there was not sufficient evidence on which the jury could reasonably find that the words bore a defamatory meaning : *per* LORD BLACKBURN in *Capital & Counties Bank* v. *Henty* (3), at p. 775. A new trial ought to be had, because the judge admitted in evidence a G former article in the same newspaper as tending to show that the article complained of had, or was intended to have, a worse meaning than appeared on its face, because he did not direct the jury to dismiss from their minds the evidence brought by the plaintiff to show such worse meaning or the evidence of the later article, and because the verdict of H the jury was so obviously a compromise that, if a new trial of all the issues were not allowed, a serious miscarriage of justice would occur.

SLESSER, L.J. : This is an action for defamation brought by a society registered under the Industrial and Provident Societies Acts, the English and Scottish Co-operative Properties, Mortgage and Investment Society, Ltd., against Odhams Press, Ltd., and the Daily Herald, Ltd., who are respectively the printers and proprietors and publishers of a daily newspaper known as the Daily Herald. The article in that paper which is now complained of was in the issue of Thursday, Dec. 23, 1937. The statement is contained in various kinds of type now usual in newspapers, and more particularly in those making a popular appeal. There is written in italics in large print at the top of the statement these words: "False Profit Return Charge Against Society." To those not used to reading newspapers, it may be a little difficult, in the absence of all the verbs, to give any sense to those words, but we have all, I think, become familiarised with the modern methods of expression used by newspapers in their headlines, and those words, I think, would convey to an ordinary man of reasonable intelligence the meaning that against the society there had been, or there was about to be, made a charge of making a return which stated a false profit. I think that that is a fair paraphrase of those somewhat curious words. Then follow words which, for the most part, are themselves unobjectionable, and are, it is conceded, in their natural meaning, an accurate statement of facts:

> Summonses for making a return wrongfully stating the profit for 1936 have been issued against [the defendant society] and the managing director, Mr. J. Wolstenholme. This action has been taken by the registrar of friendly societies. The case is put down for hearing at Marlborough Street Police Court on Dec. 30.

Then the print gets slightly blacker, and more emphatic:

> Annual returns
>
> Annual returns for 1936 made to the registrar of friendly societies showed a profit of £4,833, but this was made, as was stated in the return, only after including £11,131 net proceeds from the sale of a ground rent of one of the society's properties, and £7,768 surplus of realisation on other properties.

The print then becomes fainter:

> In their report on the 1936 accounts, the auditors drew attention to the sale of the ground rent, and gave their opinion that this amount was not a realised profit.

Then in large letters comes "The Directors," and then in smaller letters:

> The directors of the society at the time of the last annual report were Brig.-Gen. Sir William Horwood, G.B.E., K.C.B., D.S.O. (chairman), a former Commissioner of the Metropolitan Police; Sir Gervais Rentoul, K.C., a London magistrate. Lord Massereene and Ferrard, D.S.O., and Mr. J. Wolstenholme (managing director). Sir Gervais Rentoul told the Daily Herald last night: "The summonses are in connection with the balance sheet issued last night, when I was a director. Viscount Massereene resigned two or three months ago because he was ill. Sir William Horwood and Mr. Wolstenholme are still directors."

On Friday, Dec. 10—that is to say, some 13 days before the issue complained of—there had been another statement in the same newspaper:

> Friendly Society Heads may be Sued.
>
> A court case of supreme interest to all investors in mortgages and property-holding friendly societies of a certain category is likely to come before a London court. In consequence of collaboration between the chief registrar of friendly societies and another authority, proceedings are contemplated. Such action, if taken, will be against the directors of a registered friendly society with headquarters in London. Among the directors are men of title and eminent public

> service. The action arises out of alleged contravention of the special Act governing friendly societies. Inquiries in progress cover the activities not only of this one particular society, but of others in which the trading methods are of a rather similar character.

In the statement of claim, the complaint—at any rate, so far as we have now to consider the matter—is limited to the issue of Dec. 23, which I have read. There is pleaded in para. 5 the following innuendo :

> By the said words the defendants meant and were understood to mean that the plaintiffs had deliberately falsified their accounts, and had published a return of annual profits which they knew to be wrong and had been advised by their auditors to be wrong, and that they had done so with a view to deceiving their shareholders and bondholders and the general public as to their true financial position, and that they were insolvent or in an unstable financial position, and that they were a society which investors should avoid, and that they carried on their business and attracted investors by dishonest methods.

The innuendo there pleaded was objected to by the defendants, on the ground that the words in their natural and ordinary meaning were incapable of the innuendo there set out. The judge ruled, however, that the words were capable of an innuendo, and left the matter to the jury. That ruling is the subject of a cross-appeal.

The words being, therefore, left to the jury, the judge for convenience disintegrated them into six different allegations, to each of which the jury replied " Yes," as follows :

> . . . meant and were understood to mean [that the plaintiffs] had deliberately falsified their accounts, [and that they] had published a return of annual profits which they knew to be wrong, [and which they] had been advised by their auditors to be wrong, [and] that they had done so with a view to deceiving their shareholders and bondholders and the general public as to their true position, [and] that they were insolvent or unstable, and a society which investors should avoid, [and] that they carried on their business by dishonest methods.

All those words the jury found were words which arose out of the statement made in the issue of the DAILY HERALD on Dec. 23, 1937. A more terrible indictment of a society of this kind it is difficult to imagine. Every kind of fraud and falsity, according to the jury, was suggested by the words used, and, of course, so far as the innuendo was concerned, there was no attempt at any justification. Nevertheless, the jury, despite this finding of falsity and fraud and attempt at deception of shareholders and the like, compensated the plaintiff society in the small sum of one farthing, and there is an appeal to this court for a new trial on that ground.

Counsel for the appellants says that, in his view, the new trial should be limited to the quantification of damages, and, as on all other matters he has succeeded, he asks us to limit the order for a new trial, as was done in *Tolley* v. *Fry* (*J. S.*) *& Sons, Ltd.* (1), to the assessment of damages.

The grounds on which the cross-appeal is based logically come before the appeal of the appellants, because, if it be true that the judge was wrong in leaving this matter of innuendo at all to the jury, it would follow that the plaintiffs would fail, because they admitted that in one sense the words as stated in the article are true. I say " in one sense " advisedly, because, as I see this case, some confusion appears to have arisen in this way. It is said by the plaintiffs that all that those words would convey, in their natural sense, without reference to extrinsic facts, to any reasonable person of ordinary intelligence, experience and education, is the meaning which is attributed to them by the innuendo. They do not seek to set up here any secondary meaning in this sense. They do not say that those words are words which require evidence of special circumstances, or of some special situation, so that the innuendo may be put upon them. They say that the ordinary newspaper-reader, reading those words, would form the opinion that the defendants did make those accusations against the plaintiffs which are set out in para. 5 of the statement of claim. That, as I understand, is the *gravamen* of their complaint. When one comes to look at the language, the matter being, of course, limited on this head to the question of whether the judge was right in holding that the words were capable of the innuendo, without evidence of any secondary or special meaning, but in their natural and ordinary meaning, which is what the plaintiffs were contending for, one finds this at the outset. The heading of the whole matter in large type in italics contains these words : " False Profit Return Charge Against Society." It is the society which, as they describe it, is charged with having made a return falsely showing a profit.

If one stops at that heading, what does the word " false " convey to the ordinary reader ? In the dictionary sense, the word " false " may mean deceitful, untrue or dishonest ; or it may have the less usual, but I think still an ordinary meaning, of mistaken, inaccurate, or untrue, but not implying any moral obliquity at all. However, I do not think that this is the type of case to which LORD HALSBURY, L.C., refers in *Nevill* v. *Fine Art & General Insurance Co.* (2), where one has to seek for the evil meaning and discard the innocent meaning. I think that the ordinary reader, reading this, would assume that the word " false " in this context, and stated with this imprint, meant something fraudulent. I think one may take into consideration the fact, as was said in *Capital & Counties Bank* v. *Henty* (3) by LORD SELBORNE, L.C., at p. 744, approving what WILDE, C.J., had said in *Sturt* v. *Blagg* (4), at p. 908, of " the manner and the occasion of the publication." This is published in a popular newspaper. If the words " false profit " in a popular newspaper mean that which is merely untrue, in the technical sense that something had been attributed to profit which, being the sale of freehold land, technically should not have been so called, I do not think that that would have found expression in large italicised block type as something worthy of observation by the readers of the newspaper. As I pointed out during the argument, we have frequently in this court, sitting in revenue cases, to decide the very difficult question whether a particular profit or gain is to be considered income so as to attract tax or whether it is a capital increment. I have never known the DAILY HERALD or any other daily newspaper, when some gentleman has falsely, if you please, stated that to be capital which has turned out ultimately to be income, to honour that state of things by a statement in large letters in italics: "False return to the income tax authorities." I think one is entitled to have regard to the mode and occasion, and to say that, in the mind of the ordinary man, a jury might come to the conclusion that these words were defamatory in their ordinary and natural meaning, having regard to the place in which they appear in this paper and having regard to the ambiguous, at least, if not to the primary, meaning of the word "false"—namely, that it connotes something of a fraudulent nature. All that the judge had to do was to decide that these words were capable of that meaning, and I think he was right in leaving the matter to the jury in that form.

We have been told the history of this matter. The facts are these, so far as they are material. It is quite true that a summons was taken out against this society, which, being registered under the Industrial and Provident Societies Acts, is required to make an annual return under the Act of 1893. That annual return has now, by an amending Act, to be passed by public auditors. A difference of opinion arose between the society and those auditors as to whether or not, on the return, a certain accession to the wealth of the society should be treated as a profit. It seems to me immaterial for this purpose to consider whether the method employed was an appropriate method of dealing with the matter—namely, to bring proceedings under sect. 10 (*c*) of the 1913 Act before the magistrate in the form of an information alleging that the society had made a return which was false. Whether it is expedient to test these nice points by means of criminal proceedings I doubt. We have expressed recently, in a test case under the Stamp Act, the view that it is very often undesirable. Be that as it may, this case was brought before the magistrate after this publication in the Daily Herald, with the result that this society was fined £5, it being stated by counsel for the prosecution more than once, and repeated by the magistrate, that no suggestion of fraud or improper dealing had been made at all. The magistrate took the view of the public auditors that technically this was not a profit, a view contrary to the advice which had been given to the society, which had taken legal opinion on the matter of an eminent King's Counsel. So much, therefore, for that part of the cross-appeal. I am of opinion, for the reasons I have stated, that it fails.

Certain other grounds, however, were alleged with regard to this cross-appeal. One was that there was a misdirection by the judge, in that he had drawn the jury's attention to the earlier issue of the paper, which I have read, of Dec. 10. I need not pause once more to set out its terms. In so far as that earlier issue was evidence, I think that it was rightly received as evidence. The only objection is that it does not identify by name the society and the directors. The satisfaction of the appetite of curiosity raised on Dec. 10 was only completed on Dec. 23. Nothing, however, turns on that matter. When the judge did in fact deal with this, he simply said that, as a matter of history, he would refer to the issue of Dec. 10. It might be that more might have been made of it on behalf of the plaintiffs, but, as I understand, very little use was made of it at all. There is obviously no misdirection there.

Then I come to another objection which was raised rather by Mr. Shawcross than by Mr. St. John Field—namely, that the view of Mr. Dean, who was called as a witness, and who was the chairman of directors of the plaintiff society, should not have been allowed to have been before the court. Much of Mr. Dean's opinion of this libel was elicited in cross-examination, and I find it difficult to see how that can possibly be a ground on behalf of the defendants for a new trial. I am rather inclined to agree that the opinions of Mr. Dean may be entirely irrelevant, but their irrelevance has not in any way caused a miscarriage of justice.

Then one comes to the substance of this matter, which is the ground of the appeal by the plaintiffs. As I have said, counsel for the appellants based his appeal on two grounds. The first is misdirection. With regard to misdirection, what is said is this. The judge left the jury with the impression that, on the one hand, either they must be satisfied that the plaintiffs had suffered a loss in business as a result of this libel, or, on the other hand, if they thought that was not so, they must not give any pecuniary damage other than something purely nominal or nothing at all.

The actual words particularly complained of were these:

> It was open to the plaintiff society here, if they had thought it right to do so, to plead what is called special damage. I daresay some of you may have had experience of that, and you may have been in a jury-box before. If not, I daresay you have read accounts of trials in which people have said, "I have been damaged by this man. I had a good contract which was just going to be signed, and, as a result of my being held up as a rogue, the thing went off. I was going to get a big order and make a large deal, and the deal went off," and so forth. That is what is called special damage. It is damage which the plaintiff says can be shown to have arisen as a result of this libel, or injury, or whatever it was. Nothing of the sort was suggested here. There was no evidence that the company lost any business, but it is true that, if a person publishes a defamatory libel of another, the law always assumes that that may have caused him some damage.

I speak with considerable diffidence, having regard to the very great experience of this judge and his, if I may say so, extreme capacity, particularly in summing up to juries, but I cannot help feeling in this particular paragraph, more particularly having regard to what happened in the result, that the jury must have come to the conclusion that, in so far as they were not satisfied that the company had lost any business, they must treat the damages as something quite nominal or trivial. If they did go into their deliberations with that point of view, they were entirely in error. A libel by the invasion of a legal right gives a right to damages. It is the duty of the jury to assess those damages, which may be punitive or contemptuous, or, in an ordinary case, may be such as would recompense the plaintiff for the wrong done to his reputation. That is altogether apart from any question of special damage. I think that that is quite clear, and really needs no authority at all.

In the result, the jury gave a farthing. They seem to have been reluctant even about that, because they asked the judge: "Are we bound to award damages?" That may have arisen from the fact that the judge had said they "may" award damages. The judge then, perfectly correctly, told them:

A

> Members of the jury, you are bound, if you come to the conclusion which you have come to, to say what damages are recoverable. I do not say you are bound to award any particular sum.

To this the foreman of the jury replied, "Then the damages will be one farthing, my Lord," which rather looks as though they would have been B inclined to give no damages at all if they had not been compelled to do so.

However that may be, whether it be due, perhaps, to a misunderstanding by the jury of the position and of their duty consequent upon the direction, or whether it be due to the fact that they acted in a way in which in law no reasonable jury could act, I know not. In the result, C they gave a farthing, which seems to me a finding impossible to sustain. For myself, for the reasons I have indicated, I think that there was here a misdirection, but, in any case, I think that no jury, having found this terrible series of innuendoes to be what an ordinary person would understand by reading this issue, could properly award such a sum. It D seems to me so wholly insufficient to the case that I think there will have to be a new trial.

I think it would be very wrong if, in ordering a new trial, we were to put the appellants in jeopardy once more as to the whole of the matter. They have established to the satisfaction of the jury that an article has E been written containing, in the meaning which a normal man would put upon it, these injurious reflections. It seems to me, therefore, that the only matter left, the cross-appeal having failed, is the question of damages, and on that, as I say, in my view there should be a new trial. As the parties cannot consent to letting this court assess the damages, there F will have to be a new trial limited to the quantification and assessment of damages.

MACKINNON, L.J.: I agree. The accurate title of the item of news published by this paper might have been something like this: "Dispute G between accountants as to the proper principle of drawing up a balance sheet." I can hardly doubt that this newspaper would have thought such a matter was not worth reporting at all, even in the smallest paragraph, or that, if it were reported in the smallest paragraph in the smallest type, it would not have been of the least interest to any of its readers.

H Here I find, following on a paragraph with enormous headlines on Dec. 10 intimating that a charge is going to be brought, with the assistance of a person clearly indicated as the Director of Public Prosecutions, against a friendly society with directors of title, there is in this issue of Dec. 23 a lengthy paragraph with headlines in very large type, which includes the words "false charge" and begins with the words

"Summonses have been issued." I find, which is quite an unnecessary addition to the paragraph, the names, titles and qualities of the directors. It is alleged that this publication meant, and was understood to mean, and was capable of being understood to mean, only that the directors had been guilty of some criminal turpitude. I am clearly of opinion that the words are capable of that interpretation, and that, therefore, A the plaintiffs' case was rightly left to the jury. That is all that it is necessary for me to say in deciding the cross-appeal, but, as counsel for the respondents has strenuously argued that no reasonable man could so understand them, and that therefore the words should not have been left to the jury, I am tempted to add that I am quite convinced that this B was the meaning that the defendants did intend, and I am equally convinced that it is the meaning that any reasonable man would attach to them. Therefore, in my view, the cross-appeal fails.

As to the appeal, most unfortunately, I think, the judge, having gone through all this matter, was a little hasty in dealing with the damages. C Reading what he said and what the jury said, I am quite satisfied that the jury were left under the belief that, unless special damage was proved, the plaintiffs would be entitled to nominal damages only. That is the reason why they arrived at the amount they did. If they had been told that damage must be assumed if they found serious aspersions D on the defendants, and that, without proof of any actual loss sustained by them, they ought to receive such amount of damages as showed the untruth of the imputation and the seriousness of the charges, it would have been quite impossible for a reasonable jury to have said a farthing. I rather regret that the respondents will not consent to our fixing the E damages. I had originally settled in my mind on a figure which I thought would be sufficient to mark the seriousness of this accusation without being excessive. I am bound to say I rather increased that amount because I recollected that, having had their attention drawn to the matter in the letter of Feb. 2, and it being requested that an explanation F should be put in the paper, the defendants refused somewhat curtly, and said that there never was any design to do anything other than to publish what they knew to be a fact. I do not think that that was candid, and I do not think it was true. For that letter, I should, on further consideration, have increased the damages. However, we are not G allowed to fix them, and, therefore, there must be a new trial, and, I agree, a new trial on the issue of damages only.

Goddard, L.J.: I agree. Out of deference to the attractive argument of counsel for the respondents, I think I ought to add a few H words of my own. This case is a very good illustration, by way of warning, of the dangers which newspapers run if they publish information about pending litigation. They are amply protected in publishing reports of cases which are heard in courts, but, if they publish inaccurate information about pending litigation, they do it at their own risk.

The way in which this case has arisen is this. The Industrial and Provident Societies Act, 1893, s. 62 (*c*) provides that it shall be an offence under that Act if, among other things:

> . . . a registered society, or an officer or member thereof, or any other person, makes a return, or wilfully furnishes information in any respect false or insufficient . . .

A It may be that some day it will have to be decided—not in this court, because the case would be in the Crown Paper and heard in the Divisional Court—whether those words " makes a return . . . false or insufficient " mean makes a return which is merely incorrect, or whether the word " false " there implies some conscious falsity. It is immaterial for us B to consider that in this case, because, in fact, it has been assumed throughout in this case that the word " false " in that section, for the purpose of giving a magistrate jurisdiction to convict, means no more than incorrect. As I say, I reserve my opinion as to that, but it may very well be that that is right.

C What in fact happened here was that a summons was issued against this society for making a false return. Counsel for the chief registrar, who appeared to support the summons, stated on his instructions more than once that there was no question whatever as to any moral guilt at all, or any fraud. All that was said was that a particular entry was wrong. D The accountant who had advised the society and the counsel who had also given an opinion were wrong, and the Public Auditor was right. This matter was stated to be brought as a test case, and not one involving any fraud or misconduct on the part of the plaintiffs at all.

The cross-appeal in this case is based principally upon this. It is E said: " We, the newspaper, published nothing except what was strictly and accurately true, because we said that a charge had been made of making a false return, and so it had been." I think the difficulty which is in their way is this. They did not say that it was a false return in which no suggestion of fraud arose. They used the word " false," which is a F word which in one sense is ambiguous, but which would convey to most people, to the ordinary person, that the company had made a fraudulent return. The man on the Clapham omnibus, to use the classic illustration of LORD BOWEN, does not, when he has the DAILY HERALD in his hand, also have in his hand a copy of BADEN FULLER ON FRIENDLY SOCIETIES, G or a copy of GASQUET'S FRIENDLY SOCIETIES ACTS, or a copy of STONE'S JUSTICES' MANUAL. Any ordinary man, reading these passages from the newspaper, would, I think, inevitably consider that a charge involving moral obliquity on the directors was being made against the company. Therefore, it seems to me that it would have been quite impossible for H the judge to have held that the words were incapable of a defamatory meaning. If a further explanation had been given, if entirely different language had been used, the position would have been different. It would have been quite possible for the newspaper to announce that a charge under this section had been preferred. In the way that this was set out, however, with headlines, and so forth, and the language used, the inevitable result, I think, would be to lead anybody who read this to think that a charge of dishonesty was being preferred. I am supposed to know the law, but I do not pretend that I can carry accurately all the provisions of the Industrial and Provident Societies Act, 1893, as amended by the Act of 1913, in my head. I should certainly have supposed that a charge of dishonesty was being made against the directors of the company, and I think that the judge was perfectly justified in leaving the case to the jury.

The only one point on which I had any doubt at all was whether the judge should have said that there was no evidence to support, and that the words were incapable of supporting, one innuendo—namely, that the company was insolvent—but, as the innuendo which was set forth was that they were insolvent, or in an unstable financial position, I do not think that any complaint can be made about that, because I think that that is capable of the construction that they were in an unstable financial position. In any case, it would not matter, because the jury found that all the rest of the innuendoes were proved.

That being the case, the jury returned a verdict of a farthing damages. Obviously, that cannot stand. I do not refer to any particular word, or to any particular passage in the summing up, but, unfortunately, the whole summing up of the judge on the question of damages conveyed to the jury the impression that this trading company had suffered no damage at all—at least, it had not proved that it had suffered any damage at all—and therefore, in those circumstances, the damages could only be nominal. He says: "Very often juries read in newspapers about a farthing damages: but those are contemptuous damages, and not nominal damages. I think that that is the real reason why they gave the farthing." That that was the intention of the judge, and that that was the view he took of the verdict of the jury, I think is shown quite clearly from what he said when he gave judgment:

> The jury took the view that the plaintiffs, who are a company or corporation, had not been shown to have suffered any damage from the publication of what they considered defamatory matter about them. I think the jury were quite entitled, on the evidence in this case, to come to the conclusion, assuming that some defamatory matter had been published about the plaintiff corporation, that there was a complete absence, and a deliberate absence, of any attempt to show that they were a penny the worse, and, in those circumstances, the jury awarded one farthing damages to the plaintiffs.

That, I think, is the impression which the jury would get from the judge's summing up. However, it is not right. There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff can, if he likes, by way of aggravating damages, show that he has suffered actual damage, which he can prove, but in every case he is perfectly entitled to say: "Here is a serious libel upon me. The law assumes that I must have suffered damage, and I am entitled to substantial damages." If the defendant, by giving evidence in mitigation of damages, or by saying that the libel is very nearly true, but not quite, can mitigate the damages, be it so. In this case, however, there was not anything of that sort. It would have been open to the defendants in this case to have justified the libel by saying: "We are not bound by what the magistrate found in the police court proceedings. We say that this was a dishonest return. You did it dishonestly." However, they did not choose to do that. They accepted the position that there was A no moral obliquity on the plaintiff company at all.

Therefore, one has the position of a trading company having been charged, as the jury find by their answers to the questions left to them on the innuendo, with the most disgraceful conduct with which any company could be charged, and yet having been told, because they have B not given any evidence showing actual pecuniary loss, that they are to be compensated by a farthing. The fact is, there was misdirection here.

Apart from that, it was a verdict which, in my opinion, no reasonable jury could find. I regret that the defendants have not agreed to this court assessing the damages, because it would have saved the expense of a C new trial. If this case were going down for trial by another jury, there would have been something in it, but, as, under the emergency legislation, it will have to be tried by a judge, I should have thought it would have been more satisfactory for the defendants to have had the damages assessed by three heads instead of by one. However, they are perfectly D entitled to take up that attitude, even if I think it is an unreasonable attitude. Therefore, I agree that the case must go down for a new trial.

Appeal allowed. New trial ordered.

Solicitors: *Randolph & Dean* (for the appellants); *Lewis & Lewis* (for E the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

F

CARPENTERS ESTATES, LTD. v. DAVIES.

[CHANCERY DIVISION (Farwell, J.), **November 29, 1939.**]

Specific Performance—Building contract—Contract to make sewers and roads—Whether defendant must by the contract obtain possession of land—Defendant in fact in possession of land on which work to be done.

G

The plaintiff company purchased building land from the defendant, who, in the transfer, covenanted to make certain roads and sewers. The defendant made the roads sufficiently for building operations to be commenced, but did nothing with regard to the sewers. The plaintiffs, who had not commenced the erection of any buildings on the land, claimed specific performance of the defendant's covenant. It was H found as a fact that there was other property in the neighbourhood which had remained unlet for some time, and that it was not shown that any buildings erected by the plaintiff company could have been profitably let:—

HELD: the plaintiff company could not have been properly compensated for the defendant's breach of covenant by an award of damages and was entitled to a decree for specific performance of the covenant. It was not necessary for the granting of this decree that the defendant was in possession of the land by the contract. It was sufficient that the defendant was in possession of the land on which the work was contracted to be done.

Wolverhampton Corpn. v. *Emmons* (1) *considered.*

[**EDITORIAL NOTE.** It has been laid down that there are three essentials which must be fulfilled before the court will grant specific performance of a contract to build. The first two essentials—clear definition of the work and the substantial A interest of the plaintiff in the performance of the work—are not called in question here. The discussion here is as to the precise terms in which the third essential shall be couched. The usual statement is taken from the judgment of ROMER, L.J., in *Wolverhampton Corpn.* v. *Emmons* (1) and states that the defendant must *by the contract* have obtained possession of the land on which the work is to be done. The judgment herein dissents from this statement, and it is held to be sufficient B if the defendant is in possession of the land.

AS TO SPECIFIC PERFORMANCE OF BUILDING CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 333, 334, para. 365; and FOR CASES, see DIGEST, Vol. 7, pp. 400, 401, Nos. 265-273.]

Cases referred to:

(1) *Wolverhampton Corpn.* v. *Emmons*, [1901] 1 K.B. 515; 7 Digest 401, *273*; 70 L.J.K.B. 429; 84 L.T. 407. C

(2) *Ryan* v. *Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116; 42 Digest 443, *138*; 62 L.J.Ch. 252; 67 L.T. 820.

(3) *Mosely* v. *Virgin* (1796), 3 Ves. 184; 7 Digest 400, *265*.

ACTION for specific performance by the defendant of certain covenants D entered into by the defendant with the plaintiff company for the making of certain roads and certain drainage works upon land in the possession of the defendant. The facts are fully set out in the judgment.

M. Gravenor Hewins for the plaintiffs.

Sebag Shaw for the defendant. E

FARWELL, J.: The plaintiff company is a company which has been formed for the purpose of, among other things, developing an estate which they have purchased in Essex. The plaintiff company entered into an agreement with the defendant on July 13, 1937, to purchase a F plot of land in Essex, being a plot of undeveloped land of some three-quarters of an acre situate between the roads known as Church Hill and Rectory Lane. The matter was completed by a transfer dated Sept. 25, 1937, and by that transfer the defendant, who is the owner in fee simple subject to mortgage, with the concurrence of the mortgagee: G

> . . . transferred to [the plaintiffs] in fee simple a piece of land situate at the corner of Church Hill and Rectory Lane in the parish of Loughton in the county of Essex as shown and coloured red on the plan which is referred to in the transfer together with a right of way for [the plaintiffs] and their successors in title and all other persons authorised by them over all roads and footways on the Church Hill Estate and full and free right for the purchasers and their successors in title to connect up with and use all sewers drains pipes and watercourses gas electric and water H mains then or thereafter laid in under and over the roads and footways on the Church Hill Estate.

As I have said, the plaintiffs acquired the land for the purpose of building upon it. The transfer contained a covenant by the defendant in these terms:

> [The defendant] on behalf of herself and her successors in title covenants with

> [the plaintiffs] and their successors in title that she will at her own expense and free of all cost and expenses to [the plaintiffs] and their successors in title . . . completely finish the accommodation roadways (including channelling kerbing sewering paving and lighting) between the said land and the public highways in accordance with the town planning scheme requiring the said accommodation roadways to the satisfaction of the local or other authority at the expense of [the defendant] such accommodation roadways to give complete access for all purposes from Church Hill and Rectory Lane respectively over the dyke running round the frontage of the said land to the buildings to be erected on the said land and further that [the defendant] would construct and lay at [the defendant's] own expense all necessary main sewers and drains and electric gas and water mains thereunder (the said accommodation roadways and pavements being coloured brown on the said plan) and further that [the defendant] would properly construct and completely finish the passageway in the rear of the said land (which is coloured brown hatched green on the said plan) with rolled gravel and would lay and connect a main sewer in the position shown by a dotted black line on the said plan to enable [the plaintiffs] to connect the drains and sewers from the buildings to be erected on the said land at the point marked X and that all the said items should be properly completed to the requirements and satisfaction of the local or other authority and should be completed within three months of the date of the said transfer.

With regard to the roads, what the defendant has done is this. She has concreted part of the accommodation roadways and has made a hard core foundation over the roads which she has covenanted to make. The county council required that those roads should be made with a hard core and finished with tarmac, and, so far as the hard core is concerned, the defendant has made those roads. They have not been finished with tarmac finish, but they are, and the evidence satisfies me on this, in a perfectly proper condition for the purpose of using the site which the plaintiffs bought for building purposes. The roads are perfectly passable, and they are in the condition in which it is usual to leave roads until the building operations have been completed, because, when once the tarmac finish is put down, the cartage of heavy materials by lorries passing over it is apt to damage the surface, and it may require re-doing. Therefore, it is not unusual to leave the roads in the condition in which they now are until the building operations have been complete, and, so far as the roads themselves are concerned, there has been nothing which has in any way prevented the plaintiff company from proceeding with the building of any erections which they desire to put up on the site which they bought.

With regard to the making of the sewers, that has not been done. It would be impossible to deal with any buildings on the land until they could be connected up with the sewers, because the local authority would not permit such houses or buildings to be occupied until there were proper drainage arrangements. The evidence shows, however, that, had the houses and shops been erected, it would not have taken a very long time for the defendant to have carried out her contract, and to have made the connection necessary to enable the buildings to be connected up with the main sewers. The fact remains, however, that the defendant has not carried out the obligations which she undertook in the transfer to which I have referred, and, since the transfer in Sept., 1937, the covenant has not been fully performed. The plaintiff company from time to time wrote and pressed the defendant to carry out her obligations and to complete the work, but from time to time the matter was put off, and nothing in fact was done by the defendant beyond what I have already mentioned. Ultimately, the plaintiff company, in Nov., 1938, issued the writ in this action.

The position now is that no houses or shops have been erected by the plaintiff company upon the plaintiffs' land, and that the defendant has failed to carry out her obligation. She has not fully made up the roads, although she has made them up in a way which would enable building operations to be carried out, and she has not performed that part of the covenant which has relation to the sewers and the drains. Thus, there can be no doubt that the defendant has committed a breach of the covenant which she entered into by the transfer of Sept. 25, 1937.

In those circumstances, two questions arise. (i) Is this a case in which the plaintiffs are entitled to an order for specific performance? (ii) Are the plaintiffs entitled to damages, and, if so, what is the measure of damage? With regard to the question of specific performance, it is true to say that, generally speaking, this court does not grant specific performance of a contract to erect and to build. The matter has been considered in various cases, and one of the cases to which I have been referred is *Wolverhampton Corpn.* v. *Emmons* (1). In that case, the headnote states that the plaintiffs were an urban sanitary authority, and:

> . . . in pursuance of a scheme of street improvement, sold and conveyed to the defendant a plot of land abutting on a street, the defendant covenanting with them that he would erect buildings thereon within a certain time. The nature of the buildings to be erected was not precisely specified by the covenant, but subsequently, in consideration of the plaintiffs' giving the defendant further time for performance of his obligation to erect buildings, he agreed to erect on the land eight houses in accordance with certain plans, submitted by him to, and approved by the plaintiffs, which definitely showed the nature and particulars of the houses to be erected. The defendant failing to perform this last-mentioned agreement, the plaintiffs brought an action against him claiming specific performance:—HELD, that the case came within the class of cases which has been recognised by the courts as forming an exception to the general rule . . .

An order for specific performance was then made. In that case, SIR A. L. SMITH, M.R., said, at pp. 522, 523:

> The authorities to which reference has been made appear to me to show that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by courts of equity in relation to such matters, specific performance ought to be ordered. If a man has contracted to build a house on a piece of land according to certain detailed plans, and has obtained a conveyance of the land on the terms that he will do so, why should he be allowed to turn round and refuse to perform that contract especially where damages will not compensate the person with whom he has contracted? In the judgment of KAY, L.J., in *Ryan* v. *Mutual Tontine Westminster Chambers Assoc.* (2), after stating that ordinarily the court will not enforce specific performance of building works because damages are generally in such cases an adequate remedy, and the court cannot superintend such works—of which last objection I have never seen the force—he said [p.128]: "An exception to this rule has been established in cases where a railway company has taken lands from a landowner on the terms that it will carry out certain works." Here the defendant has taken land from the plaintiffs on the terms that he will erect buildings. KAY, L.J., proceeded [p.128]: "In those cases, because damages are not an adequate remedy, the

> court has gone to great lengths, and has granted specific performance of the definite works—they must be definite works—which the company that has taken the lands has contracted to do." In the present case I agree with the learned judge that, though the original covenant did not specify the buildings to be erected, the plans referred to by the subsequent agreement define the work to be done sufficiently to enable the court to make an order for specific performance.

Accordingly, the appeal in that case was dismissed, WILLS, J., having A granted specific performance. COLLINS, L.J., agrees with SIR A. L. SMITH, M.R., and I do not think there is anything in his judgment to which I need refer, but I must refer to the judgment of ROMER, L.J. He also agreed that the judgment of WILLS, J., should be affirmed. He states the question in this way, at pp. 524, 525:

> B The question, which is not free from difficulty, is whether, under the circumstances of this case, an order for specific performance should be made in favour of the plaintiffs. There is no doubt that as a general rule the court will not enforce specific performance of a building contract, but an exception from the rule has been recognised. It has, I think, for some time been held that, in order to bring himself within that exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce the performance, is defined C by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done. The rule on this subject is stated by FRY, L.J., in his work on SPECIFIC PERFORMANCE, 3rd Edn., pp. 44, 45, in substanti- D ally the same terms as those in which I have just stated it.

Then he proceeds to consider whether or not the plaintiff in that case before him had brought himself within the exception.

The only exception which, with great respect, I venture to take to what ROMER, L.J., there says is to that part where he says that the E third matter which it is necessary for the plaintiff to show to bring himself within the exception is that the defendant has by the contract obtained possession of the land on which the work is contracted to be done. I would rather say that what the plaintiff has to establish is that the defendant is in possession of the land on which the work is F contracted to be done. Obviously, if the defendant is no longer, or is not, in possession of the land, it may be impossible for him to carry out the contract, and, of course, in such a case as that, the court would not grant specific performance. If, however, as in the present case, the defendant is in possession of the land, and there is no difficulty about G the defendant carrying out the obligation under which she has put herself, then it seems to me that, if the other two requirements are satisfied —namely, that the particulars of the work are sufficiently clear and defined, and that it is a case in which the plaintiff has a substantial interest in having the contract performed which cannot be adequately H compensated for by damages—then, in such a case as that, the court will, if it thinks right, in a proper case, grant specific performance. That seems to me to be in accordance with what has been decided in other cases, such as *Mosely* v. *Virgin* (3), where the court has seen fit to grant specific performance.

I think, speaking for myself, that this portion of the judgment of

Romer, L.J., is a statement which is perhaps not strictly accurate, so far as the last requirement is concerned. In my view, the mere fact that the defendant has not got possession of land on which the work is contracted to be done is not necessarily a complete bar to the court's granting specific performance. If, in the present case, the defendant has contracted to do the work on her own land in consideration of the purchase price of other land belonging to her, then, if the other two conditions are fulfilled, for myself I am wholly unable to see why the court should be debarred from granting relief by way of specific performance, and I am not prepared to accept the statement of Romer, L.J., as completely exhaustive, so as to prevent my granting specific performance if I think it right to do so in the present case.

The nature of the work which the defendant has undertaken to do seems to me in this case to be sufficiently clearly defined. She has to finish completely accommodation roads which are clearly defined in the plan attached to the transfer, and has to construct certain sewers and drains which are also defined in the contract, and that has to be done within 3 months to the requirements and satisfaction of the local or other authority. In my judgment, there is nothing whatever in the contract itself which prevents the court from granting specific performance. The court will not grant specific performance in a case of this kind, however, unless it is satisfied that there is no sufficient remedy by way of damages. In the present case, the plaintiffs have, in my judgment, a substantial interest in having the contract performed, and, so long as the contract remains unperformed, the plaintiffs may find it impossible, or extremely difficult, to deal with their land in any way. Moreover, it is, in my judgment, a case in which the plaintiffs cannot be compensated by damages. The position is that the plaintiffs' only prospect of making an advantageous use of the land in question was, and is, to build upon it buildings which they can dispose of either by sale or by lease at a profit. In fact, they have not attempted to erect any building on the land at all, and the fact that they have not done so cannot be put down to the failure of the defendant to make the roads in question, because, although the roads are not completely made up, the state of them is such that the plaintiff company could have carried out the work of constructing and erecting shops or houses on the land. No doubt, also, it is true that no effective use could be made of the erections when they were constructed unless there was a proper method of joining them up with the main sewer, but, until the houses were erected, or in course of erection, the necessity for any such connection with the main sewer did not arise, and it appears to me to be quite impossible for this court to assess with any degree of certainty at all what, if anything, the damage due to the failure by the defendant to carry out the contract might have been. It seems to me that the attempt which has been made to prove the existence of damage really is nothing more than a speculation as to what the plaintiff company might have made if they had erected a certain number of houses and if they had been fortunate enough to find tenants at the rent which was asked for all those houses and shops, and those tenants had remained satisfactory tenants from the point of view of paying their rents for a period of time. What in fact might have resulted from the erection of the proposed houses and shops in the beginning of 1938 is, as I have said, purely a question of guessing. There is evidence that some shops and houses in this district are unlet, and have been unlet for some period. The building of houses and shops as in this case is, at the best, a somewhat speculative way of investing money, and I think that it would be quite impossible for any court to say now what might have resulted from the erection of the proposed shops and flats at the time when they could have been erected. It may be that the plaintiffs are really better off, as things have turned out, in having saved the money which they would have put into building the shops and houses than they would have been had they erected these buildings. It may be, on the other hand, that, if they had been very fortunate, they could have found tenants quickly, and could have made a profit, but the whole matter is so speculative that I feel it impossible to assess any sum as representing the compensation here to which the plaintiffs are entitled for the failure by the defendant to carry out her contract, especially having regard to the fact that it is not possible to say that the whole of the damage, whatever it may be, which the plaintiff company think they may have suffered is wholly due to the defendant's failure to carry out her contract. It is to some extent due to the fact that the plaintiffs themselves had not done what they might have done and erected the houses and shops.

In all the circumstances, this is a case, in my judgment, in which the only adequate remedy which I can give to the plaintiffs is by way of specific performance. I am not oppressed with the difficulty in this case of the court seeing that the order for specific performance is performed, and I myself feel that, if I am not in a position to give the plaintiffs specific performance, I cannot give the plaintiffs any adequate remedy, and, in fact, it would be a case where the plaintiffs, having a perfectly good covenant which has been broken, and being entitled *prima facie* to have that covenant performed, would be deprived of the remedy, because it is a case in which, if I took the view that I could not grant specific performance, the plaintiffs would get no adequate compensation at all. In all these circumstances, I have come to the conclusion that the right order to make in this case is to make an order for specific performance of the covenant. So far as damages are concerned, I can give the plaintiffs no more than nominal damages.

Order for specific performance and for 40*s. damages and costs.*

Solicitors: *Payne & Co.* (for the plaintiffs); *Clarke & Co.* (for the defendant).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

FINSKA ANGFARTYGS AKTIEBOLAGET AND OTHERS *v.* BARING BROTHERS & CO., LTD.

[House of Lords (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Romer), **November 13, 14, 15, December 13, 1939.**] A

Choses in Action—Assignment—Foreign acts of state—Duly authenticated copies of orders unobtainable and no access to originals—Law applicable to assignments made abroad—Whether facts constitute assignment—Evidence Act, 1851 (c. 99), *s.* 7.

During 1916 and 1917, thirteen ships belonging to the appellants, a group of Finnish ship-owners who were then Russian subjects, were B taken over by the Russian government and lent to the British government for war purposes. Payment for the use of the ships was made by the British government to the Russian government. No payment having been received by the appellants from the Russian government, either before or after the 1917 revolution, in respect of the hire of the ships or as compensation for four thereof which were sunk as a result of enemy action, the appellants sued the respondents, an English bank, C with whom funds were deposited by the Russian government before the revolution. The appellants claimed that they were the legal assignees of the former Russian government of a part of the balance of the funds equivalent to the sums due to them in respect of the ships. Copies of orders duly issued by the Russian government were produced as evidence by the appellants, who claimed that such evidence constituted an assignment. The appellants adduced further evidence before the D Court of Appeal :—

Held : (i) the further evidence adduced by the appellants before the Court of Appeal was inconsistent with the documents which were the original foundation of their claim.

(ii) the appellants had failed to establish that they were the legal assignees of the former Russian government.

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[**EDITORIAL NOTE.** The litigation in respect of these large funds in the hands of the respondents to the present appeal has been considerable. In the present proceedings it was unsuccessfully attempted to prove an assignment, but this has failed because the final direction to pay, which was intended to have been given by the then Russian Government, was not given, because that government was overthrown before the necessary formalities were completed. F

As to Essentials of Assignment, see HALSBURY, Hailsham Edn., Vol. 4, pp. 437-444, paras. 805-812 ; and for Cases, see DIGEST, Vol. 8, pp. 445-456, Nos. 205-287.]

Appeal from an order of the Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), dated July 11, 1938, ordering that G the judgment of Luxmoore, J., dated Dec. 14, 1937, whereby it was ordered that the action should be dismissed with costs, should be affirmed. The facts and the arguments are set out in the opinion of Lord Russell of Killowen.

D. N. Pritt, K.C., and *Vladimir Idelson* for the appellants. H

Valentine Holmes and *Anthony Marlowe* for the respondents.

Viscount Maugham [read by Lord Thankerton]: My Lords, like all your Lordships, I should have been glad to have decided this appeal, if I could, in favour of the Finnish shipowners, but I find myself unable to do so. The reasoned judgment of the Court of Appeal expresses precisely my own view of the case. The opinion of my noble and learned friend Lord Russell of Killowen, which I have had the advantage of reading, is to the same effect. Your Lordships considered with great care the relevant documents in the light of the evidence on Russian law which was given before Luxmoore, J.—that law being in our courts a question of fact—and came to the same conclusion as he did. The unusual feature in the case was the admission in the Court of Appeal of fresh evidence consisting of the affidavit of Dimitry Pavlovitch Miller, which seemed to supply a fresh foundation for the claim of the appellants as assignees from the Russian government of certain large sums standing to the credit of a *compte spécial* in the books of the respondents. Miller was available for cross-examination, but was not cross-examined. It is this circumstance which afforded a fair scope for argument, and counsel for the appellants made full use of it. Your Lordships, like the Court of Appeal, were, however, unable to accept Miller's evidence, relating as it did to events over 20 years old, and inconsistent as it is with the documents on which the appellants relied before Luxmoore, J. It is only fair to add that no one suggests that Miller was an untruthful witness, but great lapse of time is apt greatly to impair everyone's memory, and documents are not subject to this disadvantage. My noble and learned friend has examined Miller's statements in considerable detail, and has given reasons for not accepting them with which I agree, and to which I cannot usefully add anything. My only reason for saying what I have said is that I desire to express the hope that the course taken by the experienced counsel for the respondents in not cross-examining the witness will not be regarded as an example to be followed by others, unless, indeed, the circumstances are at least as exceptional as they were in the present case. My Lords, the appeal must be dismissed with costs.

Lord Atkin: My Lords, I entirely agree with the reasons contained in the opinion of my noble and learned friend Lord Russell of Killowen, which I have had the opportunity of reading, and which are compelling to show that the appellants have not the legal rights which they claim. I also share with him the regret that we are constrained to come to this conclusion. I should like to point out that the fund against which the appellants claim was provided by the British government under arrangement with the then Russian government as an advance to that government against Russian Treasury bills for the very purpose of enabling that government to meet claims of this kind. The money was not provided until the British government approved of the objects for which it was to be spent, and payment was not made by the bank with whom the funds were deposited until the specific payments were approved, although in the last few months this restriction was relaxed. The claim by the Finnish shipowners is for freight and loss of ships, requisitioned, indeed, by the Russian government, but chartered by them to the British government, and the freight was earned and losses incurred while the ships were rendering services for the benefit of this country. The money in the hands of the respondents, the bank, represents money which was provided in fact for the express purpose of enabling the Russian government to meet these claims, and, as is apparent from the facts narrated by my noble and learned friend, only the delay of a few days prevented the necessary order for payment of this claim being given to the bank. The amount had been agreed with the Russian government. In the events that have happened, the respondents have been left with a sum of some millions in their hands which they have enjoyed for over 20 years, and which certainly does not belong to them. They have quite correctly required that claimants for payment should prove their legal right, and in this, so far as I know, none has been successful. Nevertheless, it seems quite wrong that the dead hand should rest on this money for ever. The present Russian government appears to disclaim all interest in it. It would seem only reasonable that measures should be taken by the British government, acting with the bank, to secure that the money should reach the creditors, to pay whom it was provided, so that at any rate a *pro rata* distribution should be made amongst that special class, of whom the Finnish shipowners are conspicuous examples.

LORD RUSSELL OF KILLOWEN: My Lords, I feel sure that I express the feelings of all your Lordships when I say that, if I could, consistently with true legal principles, accede to the claim of the Finnish shipowners in this case, I would very gladly do so. I am, however, of opinion that, when tested by those principles, their claim cannot succeed. The claim is that they are either jointly or severally entitled as assignees from the Russian government, of part or parts of the moneys standing to the credit of the *compte spécial*, either jointly to two sums of £196,915 and £259,250, or severally to such parts thereof as appear in a table annexed to the statement of claim. The sum of £196,915 is claimed in respect of the use of ships requisitioned by the Russian government in 1916 and 1917, and the sum of £259,250 is in respect of the value of certain of those ships which were sunk.

The claim to be such assignees as presented before the trial judge and as adjudicated upon by him was based upon two documents, dated respectively Oct. 3, 1917, and Oct. 13, 1917, which were said to constitute, according to Russian law, legal assignments of the two sums of £196,915 and £259,250 respectively. The judge was of opinion that neither document constituted an assignment according to Russian law, and that they amounted to no more than directions that certain necessary steps be taken, which, if taken, would ultimately have resulted in payment of the sums out of the *compte spécial*, but as to which there was no evidence that the necessary steps had ever been taken. In the Court of Appeal, these alleged assignments were not seriously pressed. Reliance was there placed upon a different transaction as being an assignment. This new foundation of the plaintiffs' claim was based upon fresh evidence adduced in the Court of Appeal for the first time. Before your Lordships, also, the claim was based upon that fresh evidence, and not upon the documents of Oct. 3, 1917, and Oct. 13, 1917. I need say no more about them, except that, had I to pronounce upon their meaning and effect, I would not have desired to add a word to the judgment of LUXMOORE, J.

I now turn to the basis of the claim as presented in this House. It is unnecessary to describe to your Lordships the governmental body known as Glavzagran, or its two sections—namely, the Maritime Division for Shipping, and the Valuta Division for Foreign Exchange. Nor need I describe the origin of the *compte spécial* at Baring Brothers & Co., Ltd., or the means by which the account was fed, or the procedure followed when a department of the Russian government was desirous of making thereout a payment in sterling. These matters have all been explained in detail in the judgments of LUXMOORE, J., and the Court of Appeal. It is sufficient to say that in July or August, 1917, a very large balance stood to the credit of the *compte spécial*, and that at or about that time the British government told the Russian government to use up the existing balance before applying for the discount of any further bills. The witness Conrad de Sahmen called this balance a "free" balance, and it was contended that this meant and showed that the British government had no voice in, or control over, the payments to be made out of that balance. It is not necessary, in the view which I take of the case, to say anything on the subject of this contention, for I will assume in favour of the appellants that it is well-founded.

The new witness upon whose evidence the claim of the appellants to be assignees was based in the Court of Appeal was Dimitry Pavlovitch Miller. His evidence is contained in an affidavit. He was available for cross-examination on behalf of the respondents, but was not cross-examined. He was formerly a Russian subject and lived in Russia, but he left that country on Sept. 28, 1917 (old style). In Oct., 1915, he was attached to the governmental department known as the Valuta Commission, which in or about Mar., 1917, became (in effect) the Valuta Division of Glavzagran. From Mar., 1917, until about Sept. 24, 1917 (old style), he was the head of a section of the Valuta Division, and was secretary of the Valuta Division. He deposes to a practice by which the Valuta Division made a provisional allocation of an amount of foreign currency to a Russian government department which required it for a specified purpose, a black-ink entry being made in the books of the Valuta Division showing the provisional or conditional allocation. The entry would be made in the name of the ultimate payee if it were known at the time. If not, it would be made in the name of the applicant department. An allocation became unconditional (he says) when the Valuta Division was informed by the applicant department that the contract in question had been actually placed, but, when the foreign currency required was (to put it shortly) sterling to the credit of the *compte spécial*, the allocation would not become unconditional until the Valuta Division had been informed that the purpose for which the foreign currency was required had been approved by the appropriate department of the British government. Upon the allocation becoming unconditional, the black-ink entry was underlined in red ink. The affidavit then states :

> When once an entry in the books had been underlined in red ink the corresponding amount of foreign currency was regarded by the Valuta Division of Glavzagran as having ceased to be the property of the Russian government and to have become the property of the firm or person against whose name the said amount was entered, and no alteration could be made in the amount so allotted without the consent of that firm or person.

He then goes on to state that he was present at a meeting of the Valuta Division at some date in Sept., 1917. This must have taken place before Sept. 24, 1917 (old style). There were present a representative or representatives of the Finnish shipowners, and of the other division of Glavzagran, and also the president of the Russian government committee in London, General Hermonius. He states that it was reported to the meeting that an agreement had been reached concerning the amounts to be paid to the Finnish shipowners, and that the appropriate department of the British government had approved of sterling currency out of the credits granted by the British government being used for such purpose. No final calculation of the precise ámount payable was made, but, to the best of his recollection, £460,000 was fixed as an amount which could not have been less than the amount then owing up to Aug. 1, 1917 (old style). An entry was immediately after the meeting made in red ink in the books of Glavzagran of £460,000 either against the names of the Finnish shipowners or against a general group-description of " the Finnish shipowners."

My Lords, it is not surprising that the Court of Appeal looked askance at this evidence, which related to events over 20 years old, and felt themselves unable to accept it. It is inconsistent with the documents which were the original foundation of the plaintiffs' claim, and, in particular, with the two documents of Oct. 3, 1917, and Oct. 13, 1917, by which General Michelson approved a recommendation of the Maritime Division, that payments to the shipowners be made in sterling, and indicated the necessary steps to effectuate that payment, which included the provision of counter-valuta, which was never provided. This seems to me quite irreconcilable with the idea that the Finnish shipowners were already the legal owners of £460,000, part of the *compte spécial*. Indeed, I can conceive no reason why the parties should ever have contemplated that this debt should be paid by so unusual a procedure as by a legal assignment to the creditor of a portion of the debtor's bank balance, and I agree with the Court of Appeal that it is impossible to hold that Glavzagran can have agreed to make a binding and irrevocable allocation of part of the *compte spécial* at a time when the matter was still quite unripe for any such action.

Another aspect of this fresh evidence which presents itself to me, is one to which I think it right to call attention. It suggests another ground on which the appeal should fail. Mr. Miller's affidavit is that of one who is not an Englishman but who makes it in English. I do not know how perfect or imperfect his knowledge of English may be, but I will assume that he has complete command of that tongue and fully appreciates the language which he has used. His affidavit has been drafted with great care, but it is, I venture to think, likely to mislead unless it is examined with equal care. I say that for the reason that at first sight one imagines that the witness (after stating the conditions under which, according to general practice, an " allocation " of foreign currency became absolute and passed the property in the allocated foreign currency) has gone on to allege that, at the meeting which he describes, such an " allocation " had been made. In fact, he says no such thing. All he says is that it was reported to the meeting that the amount of the debt had been agreed, and that the British government approved of its being paid out of the *compte spécial*. In the subsequent portions of his affidavit, however, he speaks without further ado of the " sum so allocated " and " the sum allocated," and so creates the impression that an allocation of foreign currency was made at the meeting. All I can say is that, if any such allocation was in fact then made, Mr. Miller's affidavit does not prove it, and there is no evidence of the fact.

The truth seems to be that amounts and source of payment had been agreed, and that, if everything had proceeded as all anticipated, the moneys in question would in due course have been paid to the Finnish shipowners, and paid out of the *compte spécial*. However, some sand from the Lenin revolution stopped the machinery, and the debt remained unpaid. Mr. Lars Krogius described the position accurately when (on Dec. 5, 1917) he wrote to his agents in London a letter in which he said :

> In the meantime, however, the question of payment of hires and compensation for lost steamers had advanced so far that the Credit Chancery already had decided to issue cheques in London. It only required the transferring of the corresponding amount in roubles from the War Ministry to the Credit Chancery to have brought the matter in order, but this again was cut short in consequence of the Lenin revolution, and God only knows when the question might advance any further.

It is difficult to imagine that Mr. Krogius then thought he was already legal owner of part of the *compte spécial*. He was hoping that the Russian government would direct their bankers to pay him, but, unfortunately for the appellants, no such direction was ever given. The appeal must, I fear, be dismissed, though I confess I would gladly, if I could conscientiously do so, vote against the motion.

LORD WRIGHT: My Lords, I have had an opportunity of considering in print the opinions of my noble and learned friends which have just been delivered. I share their regrets, but, in the circumstances, I must concur in the motion proposed, and I have nothing to add.

LORD ATKIN: My Lords, I am asked to say that my noble and learned friend LORD ROMER agrees with the opinion expressed by my noble and learned friend LORD RUSSELL OF KILLOWEN.

Appeal dismissed with costs.

Solicitors: *Roney & Co.* (for the appellants); *Slaughter & May* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ROUSE *v.* GRAVELWORKS, LTD.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 7, 8, 11, 1939.**]

Easements—Support—Natural right of support—Neighbouring owners—Escape of water—Natural use of land—Escape by operation of natural causes—Water blown on to adjoining land by wind.

The defendants in digging for gravel on their land created a large pit, which by natural causes filled with water and formed a lake reaching almost to the boundary of the adjoining property, of which the plaintiff was the owner. The wind blew the water thus collected on to the plaintiff's land, and caused damage by erosion:—

HELD: no action would lie for such damage as the water had accumulated only as a result of the defendants' natural user of their land and had escaped on to the land of the plaintiff only by the operation of natural causes.

[**EDITORIAL NOTE.** The owner of land has no right by his own acts to withdraw the support his land gives to adjacent land. It would appear from the present case that, if natural causes, superimposed upon the acts of the owner (being in the course of the natural user of the land), result in the withdrawal of support, then this is not an infringement of the right of support and gives no cause of action to the adjoining owner.

AS TO NATURAL RIGHT OF SUPPORT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 362-365, paras. 636-641; and FOR CASES, see DIGEST, Vol. 19, pp. 163-168, Nos. 1139-1167.]

Cases referred to:

(1) *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; 34 Digest 725, *1071*; 35 L.T. 639.

(2) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 34 Digest 727, *1089*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

(3) *Hurdman* v. *North Eastern Ry. Co.* (1878), 3 C.P.D. 168; 34 Digest 724, *1065*; 47 L.J.Q.B. 368; 38 L.T. 339.

(4) *Broder* v. *Saillard* (1876), 2 Ch.D. 692; 36 Digest 190, *321*; 45 L.J.Ch. 414.

(5) *Giles* v. *Walker* (1890), 24 Q.B.D. 656; 36 Digest 195, *359*; 59 L.J.Q.B. 416; 62 L.T. 933.

(6) *Brady* v. *Warren*, [1900] 2 I.R. 632; 2 Digest 206, case c.

(7) *Smith* v. *Kenrick* (1849), 7 C.B. 515; 36 Digest 157, *8*; 18 L.J.C.P. 172; 12 L.T.O.S. 556.

APPEAL by the defendants from a judgment of CASSELS, J., at the Lincoln Assizes, dated June 21, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

A *M. D. Van Oss* for the appellants.

S. H. Granville-Smith for the respondent.

SLESSER, L.J.: This has been a difficult and troublesome case, but, as the court has come to a clear opinion on the matter, we do not
B think it necessary to reserve our judgment. The plaintiff, Albert Rouse, and the defendants, Gravelworks, Ltd., are neighbours. Gravelworks, Ltd., as their name implies, carry on the business of acquiring land, and then digging or quarrying the land for the purpose of getting out gravel. In fact, it is open digging. The plaintiff is a farmer, and
C is the owner and occupier of the field adjacent to that in which the defendants have for many years been excavating gravel. In the course of the excavations, the defendants were quite close to the boundary of the plaintiff's land, and the plaintiff said in the course of his case that in fact they had worked right over the boundary of his land, and actually
D had taken from his land certain gravel, and had deprived him of support, and had prevented some of his land from being available for agricultural user. On that matter, a dispute arose between the plaintiff and the defendants as to the exact boundary of the land. Had the boundary for which the plaintiff contended been held to be the true boundary, his
E case on this head would have been really without answer, and the only matter which would have remained would have been to have assessed the damages. However, this strip of some 4 ft. which was in dispute was adjudicated on by the judge at the trial, who held that the boundary between the two lands was where the defendants, and not where the
F plaintiff, contended it was, and there is no appeal from that part of his judgment.

The case thus comes before us on the basis of the defendants' boundary being the boundary. Upon that basis, certain considerations arise, and certain facts, which really are not in dispute. Thus, on the basis
G of that boundary, it is not now contended that the defendants have directly, by any action of their own, by their gravel-grab or digging, dug away any of the plaintiff's land. What is said, however, is this: "You, the defendants, have admittedly dug the gravel, and have created almost up to my boundary a mere of water, over which the winds will
H blow, and do blow, and those winds have already blown the water on to my land, and have already by erosion caused the disappearance of some gravel, which is estimated at the value of 7*s.* 6*d.*" That estimate of damage makes it quite clear that the damage is absolutely insignificant in amount. That is one thing. It is important to say that, at the time when the action was tried, that was in fact the only gravel which had

been taken away by this erosion caused by the wind blowing over the water, and it was an erosion which only amounted, I think, to some 5 cubic yards. It was said, at the hearing, however, that further damage is bound to follow, and that this erosion will continue until the gravel reaches a certain angle of inclination, which is a matter of mechanical ascertainment, and really not in dispute. Then, when the gravel reaches A that angle of repose, there will be a strip of some 12 ft. which will have been to some extent done away with, owing to the position of this angle, and which will not be suitable for agricultural use, though it may still be used, of course, by the plaintiff himself for the extraction of gravel. It is the surface top which would be taken away for in all about a B quarter-of-an-acre, I think.

The defendants said: "Whatever else may be the position with regard to the rights of the plaintiff, either at the time of action brought or in regard to future rights which he may acquire, we say there is here disclosed really no cause of action at all. That is to say, in law what C we have done is consistent with no more than the natural user of our land. It is said that every freeholder has the right to work his minerals, and we have done no more than work our minerals. If water has accumulated on our land in consequence of that working, and if some of that water has escaped on to the land of the plaintiff, albeit in the D form of waves which may beat on his land, we have committed no wrong against him. We have not deprived him of the lateral support to which he, as freeholder, is entitled. We have done no more than use our land in its natural way. He can point to no grant, no prescription, which gives him any right to be protected from the consequences of our natural E user of our land, and he cannot support any case for the complaint that he has suffered in lateral support."

Numerous authorities were quoted to us on this matter by counsel for the appellants. Perhaps the most conclusive for this purpose is *Wilson* v. *Waddell* (1). That case laid it down that the owner of minerals F has the right to take away the whole of what is in his land, according to the natural course of user. LORD BLACKBURN said, at p. 99:

> The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, G the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and that a servitude to prevent such an user must be founded on something more than mere neighbourhood.

I pause to say that I think that in the present case the complaint as founded is a complaint on mere neighbourhood. Then LORD BLACKBURN H goes on to quote the opinion of LORD CAIRNS, L.C., in *Rylands* v. *Fletcher* (2), at p. 338:

> [The occupiers of a close] might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws

> of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place.

I think that LORD CAIRNS, L.C., was then speaking primarily of the case of water passing on by seeping, or by underground channel, or by watercourse, but I can see no distinction between accumulation of water passing by watercourse, or by seeping, and the case of water being blown by the wind, albeit in a battering form, upon any person's land. The position seems to me to be the same. In all of them, it might be that the lateral support of the neighbourhood would be destroyed, but in none of them could it be properly said that it was the responsibility of the person who had used his land naturally, because his water had been an element upon which nature had played to destroy the natural lateral support of the plaintiff's land.

It has been indicated in argument that this principle might be, or ought to be, applied only as between one mineowner and another. For myself, I can see no reason for coming to that conclusion. If the right view be that a neighbour cannot complain because the person alleged to have injured him has been putting his land to a natural user, I cannot see what difference it makes whether or not that neighbour is himself a mineowner. If, however, there be any doubt on the matter, I think that *Hurdman* v. *North Eastern Ry. Co.* (3) makes it quite clear that the principle is one of general application. There it was held that there had been an artificial erection on some land which had caused water to flow into the plaintiff's land, and, therefore, on the principle of *Rylands* v. *Fletcher* (2), the defendant was held responsible. It was equally clear, from the way in which the case is put in the judgment, that, had there been no such artificial erection, the judgment would have gone the other way. COTTON, L.J., said, at pp. 173, 174:

> Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against anyone who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if anyone by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by JESSEL, M.R., in *Broder* v. *Saillard* (4). I have limited this statement of liability to liability for allowing things in themselves offensive to pass into a neighbour's property, and for causing by artificial means things in themselves inoffensive to pass into a neighbour's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's own land (as building so as to interfere with the prospect, or so as to obstruct lights not ancient) are not actionable, even though they interfere with a neighbour's enjoyment of his property. But it is urged that this is at variance with the decision that if, in consequence of a mine-owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine-owner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an

> interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled), is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land. That this is the principle of these cases appears from *Wilson* v. *Waddell* (1), and from what is said by LORD CAIRNS, L.C., in *Rylands* v. *Fletcher* (2).

If that view which I have expressed be the correct one, it of course concludes this case in favour of the defendants because all the complaints made here, whether they accrued before the action was brought or were expected in the future, or were of one order or another, are complaints for none of which are the defendants responsible. In fact, however, this case was decided by the judge upon the assumption that the defendants were responsible for their alleged wrongful acts. That, I have indicated is wrong. I do not think that it would be right, however, to leave this case without expressing the view that, even had I thought the defendants responsible, I for one would have been quite unable to arrive at an understanding of the principles upon which the judge assessed the damages in this case. One thing is clear, and that is that, though the judgment on the face of it was for £75, the judge was of opinion that, as the law stood, he could only assess the damages as to the cause of action which had accrued at the time of action brought, which he assessed at £40. It appears that all parties (counsel for the appellants being careful to preserve his right to contend, as he has successfully contended in this court, that he was under no obligation at all to the plaintiff) did agree, subject to that condition, that, if he was liable at all, the judge should assess—I assume as an arbitrator, because it was clearly a matter that he had no power to assess by way of judgment, because the damage had not yet accrued, and this was an action on the case—the remaining £35 which it might be expected would be the damage which the plaintiff would sustain when the gravel reached the angle of repose. However, in reality, as regards the £40, excluding the insignificant claim for 7*s*. 6*d*. for gravel actually washed away by the operation of wind, of which I have already spoken, the only evidence that he had suffered any damage at all was that he said as regards this quarter-of-an-acre of land—I am not very clear whether it was the whole of it, or only a part of it—that he was unable to plough with a tractor, and could only plough by means of using horses, on which he said generally, without giving any particulars at all, that the tractor method would be the cheaper. The judge appears to have forgotten in his judgment that there was the alternative and efficacious method of ploughing by horses admittedly open to this man at the time when the action was brought. So far as the photographs can be believed, he actually did plough right up to the edge of the land. How the judge arrived at damages of £40, in these circumstances, it is very difficult to understand. I am of opinion that the plaintiff fails to establish any right of action at all against the defendants for damages even of a nominal character. Therefore, this appeal should be allowed.

MacKinnon, L.J.: I agree that the plaintiff's cause of action quite clearly was a claim that the defendants had impaired that right of support of the plaintiff's land which, as neighbouring landowners, they were bound to give. I think the proper answer of the defendants to that is: "We have only used our land as we are entitled to, by digging out the mineral. When we dug out the mineral, we had not in any way impaired your right of support. Your land was as much supported as you were entitled to have it. Subsequently nature intervened, and water accumulated in our land. We are not liable for that. The water having accumulated, wind blew upon it, and the effect of the natural operation of wind and water was to erode the edge of your land. That is not a thing for which we are liable, because it is the natural result of the operations of nature, for which the natural user of our land may have given the occasion, but for which we are not responsible as having caused it." The result is that, in my view (I need not repeat what has been said by Slesser, L.J.), the plaintiff fails to establish his cause of action.

As regards the judgment of the judge below, I entirely agree with what has been said. I am entirely unable to understand how the judge arrived at £75 as being the total damage which the plaintiff is supposed to have sustained when the maximum result ever to be contemplated in this case was that he would lose possession of a quarter-of-an-acre of land, which it is suggested would ultimately be washed away by the effect of the water. As the freehold value of that quarter-of-an-acre was, at the outside, £25, it is a complete mystery to me how it can be said that £75 could in any circumstances have been regarded as the proper amount of damages.

I agree that the appeal should be allowed, and judgment entered for the defendants with costs in both courts.

Goddard, L.J.: I agree. In my judgment, the plaintiff had no cause of action. This is not a case in which a defendant has introduced on to his land something which has escaped or done damage. It is a case in which he was exercising what has always been regarded in English law as the normal right of a landowner—namely, the excavation of minerals. When he had excavated the minerals on his land, the space formerly occupied by the minerals filled up with water, partly from underground places, I suppose, and partly from surface water. The result was the formation of a lake, which was on the land as naturally as a lake which is formed by a river flowing into a confined space, or a river itself. The water was naturally on the land. Then it is said that the action of the water has been to erode or undermine the neighbour's bank. It is quite obvious in this case that an action for trespass will not lie. The only question would be whether there was an action on the case. Counsel for the respondents has argued, and has argued very strenuously, that this is a case of withdrawal of support, just in exactly the same way as though in the quarry, through working the gravel, the defendants had withdrawn the support to the plaintiff's land, which they did not. It was the action of water. It was the action of water as it was affected by the wind.

It seems to me that, when the case is properly understood, one has exactly the same position as in *Giles* v. *Walker* (5), where an owner of land was held not liable because he allowed thistles to grow on his land and thistledown to escape, or in *Brady* v. *Warren* (6), in which the owner was sought to be held liable for allowing an accumulation of rabbits on his land, which escaped, following the rule in the English courts of *Smith* v. *Kenrick* (7). It is a purely natural act. If the landowner is not liable for the actual escape of water naturally on his premises, as is shown by the judgment of Lord Cairns, L.C., in *Rylands* v. *Fletcher* (2), and by the judgment in *Wilson* v. *Waddell* (1), and other cases of that nature, it seems to me impossible to say that he is responsible for water which he has himself not brought on to the land, but which is there naturally, and he cannot be responsible for any damage which that water may cause.

Appeal allowed with costs in both courts.

Solicitors: *Charles Greenwood & Co.* (for the appellants); *Gibson & Weldon*, agents for *Andrews, Stanton & Ringrose*, Bourne (for the respondents.)

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* HANCOCK.

[King's Bench Division (Wrottesley, J.), **December 19, 1939.]**

Emergency Legislation—Judgment for arrears of income tax—Whether Courts (Emergency Powers) Act, 1939, *binding on the Crown—Courts (Emergency Powers) Act,* 1939 (c. 67), *s.* 1 (1).

Execution—Crown debt—Taxes—Whether Courts (Emergency Powers) Act, 1939, *binding on the Crown—Courts (Emergency Powers) Act,* 1939 (c. 67), *s.* 1 (1).

An information was laid against the defendant claiming arrears of income tax. Judgment having been signed, the defendant contended that the Crown could not proceed to execution without the leave of the court under the Courts (Emergency Powers) Act, 1939:—

Held: the Courts (Emergency Powers) Act, 1939, did not bind the Crown, since the Crown was not specifically mentioned and there was no necessary implication to be drawn from any of the words of the Act so as to involve the Crown.

A.-G. of the Duchy of Lancaster v. *Moresby* (6) *distinguished.*

[**EDITORIAL NOTE.** The general rule as to statutes being binding upon the Crown is well settled, and the main difficulty in the present case was whether the decision of Rowlatt, J., in *A.-G. of the Duchy of Lancaster* v. *Moresby* (6) was distinguishable from the present case. It is held to be so for the reason that it was in no way concerned with the rights and remedies of the Crown in respect of the recovery of taxes.

As to Leave to Issue Execution, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and for Cases, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Cases referred to:

(1) *Re Bonham, Ex p. Postmaster General* (1879), 10 Ch.D. 595; 4 Digest 34, *286*; 48 L.J. Bcy. 84; 40 L.T. 16.

A (2) *Re Henley & Co.* (1878), 9 Ch.D. 469; 4 Digest 34, *285*; 48 L.J.Ch. 147; 39 L.T. 53; 1 Tax Cas. 209.

(3) *A.-G.* v. *Edmunds* (1870), 22 L.T. 667; 5 Digest 1022, *8343*.

(4) *Re Smith* (1876), 2 Ex.D. 47; 5 Digest 1022, *8344*; 46 L.J.Q.B. 73; 35 L.T. 858.

(5) *Wirral Estates, Ltd.* v. *Shaw*, [1932] 2 K.B. 247; Digest Supp.; 101 L.J.K.B. B 370; 147 L.T. 87.

(6) *A.-G. of Duchy of Lancaster* v. *Moresby*, [1919] W.N. 69; 42 Digest 692, *1070*.

(7) *Magdalen College, Cambridge Case* (1615), 11 Co. Rep. 66 b; 42 Digest 689, *1039*.

Special Case stated by consent for the opinion of the court pursuant C to R.S.C., Ord. 34. On Oct. 27, 1938, an information was laid against the defendant in respect of arrears of income tax, and on Nov. 28, 1938, judgment was signed for £173 11*s.* 4*d.* and £9 2*s.* 7*d.* costs. The defendant had not paid. After Sept. 3, 1939, the informant had proposed to proceed to execution on the judgment but the defendant con- D tended that the informant (that is, in effect, the Crown) was not entitled so to do without the leave of the appropriate court under the Courts (Emergency Powers) Act, 1939, s. 1 (1).

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *Reginald P. Hills* and *Valentine Holmes* for the informant.

E *Harold Murphy, K.C.*, and *J. H. Bowe* for the defendant.

Wrottesley, J.: In this case, by means of a special case stated by consent for the opinion of the court pursuant to R.S.C., Ord. 34, the Attorney-General on behalf of the Crown propounds a question which F is not so difficult to put as it is to answer, the question being whether, in respect of a judgment properly obtained against a defendant or respondent, the Crown may proceed to execute that judgment in accordance with the powers vested in the Crown, or whether, before the Crown can take that step, it is necessary for it to obtain the leave of the appro- G priate court under the Courts (Emergency Powers) Act, 1939, s. 1 (1). The defendant, of course, says that leave is necessary. Before the execution can be proceeded with, he must be given the opportunity of putting his case and resisting the Crown, if it is a case upon which he can resist it under the provisions of the Courts (Emergency Powers) Act, H 1939. The Crown, on its part, says that the Courts (Emergency Powers) Act, 1939, is one of those Acts which do not bind the Crown, in accordance with the old rule under which the Crown is not bound by Acts of Parliament unless specially named in the Act. It is clear by way of a beginning that the subject of this judgment is, as appears from the Income Tax Act, 1918, s. 169, a debt due to the Crown, and it is so provided, and one, therefore, for which the Crown is entitled to obtain judgment and to enforce that judgment. The rule dealing with Acts of this kind and the effect of these Acts upon the Crown is, of course, a very old one. In Maxwell on the Interpretation of Statutes, 8th Edn., p. 120, it is described as follows :

> It has been said that the law is *prima facie* presumed to be made for subjects only. At all events, the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible.

In Craies on Statute Law, 4th Edn., a passage dealing with this matter from Plowden is quoted as follows, at p. 361 :

> The reason of the rule is thus put by Plowden at 240 : " Because it is not an Act without the King's assent, and it is to be intended that when the King gives his assent he does not mean to prejudice himself or to bar himself of his liberty and his privilege, but he assents that it shall be a law among his subjects."

That would, perhaps, nowadays be regarded as rather an over statement of the position of the Crown with regard to Acts of Parliament, and the true rule is probably, as has been put in argument, more likely that it is not that the Crown merely legislates for its subjects but that very often the Crown legislates for itself and its subjects, and that, when the legislation in question is one which would otherwise affect, or which would affect, the Crown's rights, interests and prerogatives, then the Act does not apply to the Crown unless the Crown is specially named in that sense, and it is only a short step from that proposition to the further one that the Crown is again to be regarded as being party to the Act of Parliament which affects itself when it is shown that the Crown was to be affected by necessary implication from the language of the statute. That being the origin of this rule, and that being, as I understand it, the exception, it is clear that from time to time in the last hundred years the question has come before the courts for debate and decision.

My attention was drawn to a number of cases where the courts have had occasion to deal with this rule. In *Re Bonham, Ex p. Postmaster-General* (1), the first case to which my attention was drawn, the question was whether the provisions of the Bankruptcy Act, 1869, generally speaking applied to the Crown. I see from the report that in some sections of the Bankruptcy Act the Crown was actually named, while in others it was not. The question here was whether the filing of a liquidation petition and the appointment of a receiver by the court would affect the rights of the Crown against the person who had filed that petition, or in any way reduce or mitigate the rights of the Crown, and Sir George Jessel, M.R., said, at pp. 600, 601 ;

> The first point to be considered is what is the general law on the subject of the prerogative of the Crown. Now on that I think there is no dispute whatever. The general rule, as expressed in Bacon's Abridgment, is, " that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein ; but where a statute is general, and thereby any

> prerogative, right, title, or interest is devested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him.

The court went on to hold that generally speaking, and in this particular case, the Crown was not bound by the particular section which there came under discussion, because it was not specially named and because the result of treating that Act as binding on the Crown and affecting the Crown would have been that the Crown would have been divested of, or had taken from it, some prerogative, right, title or interest.

The next case to which my attention was drawn is *Re Henley & Co.* (2). This was a case dealing with the Companies Act, 1862. A similar question arose on the matter of a winding up in the Court of Appeal, when JAMES, L.J., said, at p. 481 :

> It appears to me clear on every principle that the Crown is not bound by the Companies Act, 1862, not being specially mentioned in it. The Crown is not debarred, in respect of any sum of money due to it, from taking proceedings against the property of the debtor ; and by the Income Tax Act the right is given to the Crown to distrain upon any of the debtor's chattels for the arrears of the tax. Independently of that Act, it is a debt due from the person in possession of the property in respect of which it is claimed. The company is in possession of the property ; they are the tenants, and are liable to pay the tax. Therefore there is nothing to prevent the Crown from suing the company or distraining their chattels, not only on the property, but anywhere else. There being this right, the Crown says that it does not wish to exercise its power of distress, but instead of that, asks to be paid in priority to the other creditors ; and the liquidator, on behalf of the company, is ready to admit that right. That being so, it being clearly a debt due to the Crown, and a debt in respect of which the property of the company might be taken, I think it is right and proper that the liquidator, as an officer of the court, should pay the debt without allowing the distress to be made.

With that opinion of JAMES, L.J., BRETT and COTTON, L.JJ., concurred. It is true that in that case there arose also a question of priority which does not arise in this case. Then came *A.-G.* v. *Edmunds* (3), which dealt with the Debtors Act, 1869, then just passed. I should say that the Debtors Act, 1869, enacted that, with certain exceptions :

> . . . no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

I need not deal with the exceptions. Down to that date, as most of us are aware, debtors could be imprisoned for debt, or for making default on the payment of a sum of money. In the course of the argument, WILLES, J., made this interlocutory observation, at p. 667 :

> [He] intimated that the Crown was not bound, unless named or impliedly referred to. He would, however, consider the question before he gave judgment.

Then he came to the other question as to whether the Crown ought not to have taken some step before proceeding to take process against the debtor with a view to arresting him. It was a point which struck the judge in the course of the argument, but, nevertheless, when he came to give judgment, what he is reported as having said was this, at p. 667 :

> . . . it was not necessary to go through the form of an inquisition as in the case of an extent. On the main question he had taken time to consider the point raised, not because he had any doubt on the general principle as to the right of the Crown, but whether the case might come within any exception to the general rule. His

> opinion was, that the case did not come within the Act of Parliament abolishing imprisonment for debt. The general principle was that the Crown was not affected except by express enactment, or by necessary implication.

I will dwell a little longer upon that case, because nobody, I think, will deny that the abolition of imprisonment for debt as such must be regarded as being a great step forward, and a step which was directed against anything in the shape of oppression, and yet it is to be seen that the court was clearly of opinion that, having regard to the form of the Act and the omission of the Crown in express terms or by necessary implication, the Crown preserved its right, if it liked, to imprison its debtors for debt. Then came *Re Smith* (4). That was a curious little case, because it appeared, and for all I know it is still the fact, that the prisoner had been an appellant in an appeal to the House of Lords, and had, in conformity with the practice in these appeals, entered a recognizance to the Crown for the payment, not of the Crown's costs, but of the respondents' costs of the appeal if unsuccessful. The appellant lost his appeal, and the appellant failed to pay the respondents' costs. His recognizance was estreated, he was arrested under process, and a writ of *habeas corpus* had been obtained, and this was the return. Although, therefore, it was not a Crown debt in reality, it was a Crown debt in form, and it was, therefore, suggested by counsel for the prisoner that he should be discharged, because the debt, though in form a Crown debt, was not so in substance, and therefore the power to imprison in respect of such a debt was taken away by the Debtors Act, 1869. LORD COLERIDGE, C.J., said, at p. 48:

> I think this is clearly a Crown debt in law, and that consequently the Debtors Act, 1869, does not apply, and the power of imprisonment continues.

With that decision, POLLOCK, B., concurred.

My attention was also called to *Wirral Estates, Ltd.* v. *Shaw* (5). The Acts under discussion there were the Rent Restrictions Acts, 1920 to 1923—not very recent legislation, but legislation which took place after the last War. That was a case of huts which had been erected by the Crown under one or other of its powers during the War. The huts had been let out to tenants, and the question was whether those tenants, the Crown having in the meantime sold the land and desiring, or the purchasers desiring, to get vacant possession, were protected by the Acts as being tenants of the Crown, and it was held that those Acts did not affect premises owned by the Crown even when they fell within the limits laid down by those Acts. That is to say, the rental and so forth was such as to make the premises subject to the Acts but for the fact that they were the Crown's property.

Thus, we have a series of decisions in Acts which are clearly for the public benefit, and one after another we find the courts deciding that, in the matter of such Acts, the Crown's prerogative, rights and interests are not affected. That is to say, the Act is to be construed so as not to affect them unless there are clear words to that effect, or words from which clearly there is only the indication that they are to be affected.

Now, however, comes the Courts (Emergency Powers) Act, 1914, for this is not the first occasion upon which Parliament has found it necessary to pass into law an Act along the lines of the Courts (Emergency Powers) Act, 1939, with which I have to deal in this case. I have looked at the 1914 Act to see what the words of that Act were as originally passed on Aug. 31, 1914, and sect. 1 provides as follows :

> (1) From and after the passing of this Act no person [which word admittedly can include the Crown] shall (*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether entered or made before or after the passing of this Act) . . . or (*b*) levy any distress, take, resume, or enter into possession of any property . . . except after such application to such court and such notice as may be provided for by rules or directions under this Act.

That was an Act which was passed in 1914 to deal with a situation which is not unlike the situation in which we find ourselves to-day. The first thing I have to note about that is that never at any time has any person, so far as I am informed, suggested that the Act bound the Crown in its application to the subject for taxes. It is not, however, that the matter did not fall to be discussed, and in point of fact no later than Nov. 24, 1914, it was left for an Irish farmer to raise the question with regard to the payment which he was liable to make to the Irish Land Commission in respect of a farm which I suppose he had purchased under one of the Irish Land Acts. He suggested that the question which the court had to decide was whether, before this debt could be enforced, there ought not to be an application under the Courts (Emergency Powers) Act, 1914, and accordingly the court, consisting of three judges of the King's Bench Division in Ireland, Madden, Boyd and Kenney, JJ., had to decide this question. The ground upon which it was argued, however, was not that the Courts (Emergency Powers) Act, 1914, applied to the Crown. That was not the ground upon which the enforcement of the payment of this debt was resisted. It was on the ground that this particular Act under which this payment was made did not make it a debt due to the Crown. As has been said in argument here, it is clear that not merely the court but also the counsel engaged in that case all assumed that, if this were a debt due to the Crown, or a payment to the Crown which the Crown was entitled to receive, in that event, the Crown not being named, and there being no necessary implication to be drawn from that, the Crown could then proceed to enforce the payment without first applying for leave under the Courts (Emergency Powers) Act, 1914. It is not, I think, unimportant, and it is not entirely irrelevant, therefore, that until to-day no person has come forward either in respect of the Courts (Emergency Powers) Act, 1914, during its pendency, or under the present Act, to claim that the Crown is, like a subject, unable to enforce its judgment until it has proceeded to get leave under the Courts (Emergency Powers) Act, 1939. However, those are not the only occasions upon which the Courts (Emergency Powers) Act, 1914, has been discussed in the courts in reference to the Crown, because on

Feb. 21, 1919, *A.-G. of Duchy of Lancaster* v. *Moresby* (6) was tried before ROWLATT, J., as he then was. That was a peculiar case. The Duchy of Lancaster had leased premises to, I will not call them tenants, but to persons interested in the lease or tenancy, and they had suffered having the premises taken from them by the Crown under one or other of its powers in the last War. Nevertheless, the Duchy of Lancaster, I suppose knowing—they must have been told—that their tenants, therefore, had no beneficial use of the premises themselves, and had also been unable to recover the compensation which was provided for by other war legislation, chose to press this claim for rent. When the case came on for trial, they were no longer pressing for their rent, because in the interim a substantial payment of compensation had been made to the tenants, and the tenants had thereupon paid their rent. It appears from the report, which is not very full, that the real dispute there was as to who should pay the costs. The Attorney-General of the Duchy of Lancaster thought that the Duchy of Lancaster ought to have their costs paid. The tenants who had this rather unfortunate experience did not think so. It was apparently upon that that this question arose, but certainly when it came to ROWLATT, J., as he then was, he is reported as having said, at p. 70:

> . . . that in his opinion the action was utterly unconscionable. The Office of Works was a department of the Crown, and it seemed to him monstrous when one department of the Crown took possession of premises belonging to His Majesty in right of the Duchy of Lancaster so that the lessees of the Duchy could not receive their rent that proceedings should be taken by the Duchy, which was another department of the Crown, to recover the rent. That was sufficient ground for him to say that he would not give costs to plaintiff.

I cannot find it in my heart to disagree with a single word which has been said so far. The report continues, at p. 70:

> He did not decide whether he had jurisdiction in such an action to award costs; he was not familiar enough with actions by or against Attorney-Generals to do so.

I think that ROWLATT, J., was permitting himself to make a humorous statement then. The report continues, at p. 70:

> With regard to the counterclaim he thought it was not properly raised. He had never heard of a counterclaim against an Attorney-General. He would therefore not give any costs to the defendants as they had not proceeded in a proper way. He had, however, to consider the substance of the counterclaim, and he had therefore to consider whether the Courts (Emergency Powers) Act, 1917, bound the Crown. That statute dealt with cases where the circumstances showed great hardship, and where the normal conduct of affairs was rendered impossible by the action of the government. He thought that this Act belonged to the class of statutes which bound the Crown as being one for the suppression of wrong: see CRAIES ON STATUTE LAW, 4th Edn., p. 361. In his opinion it was impossible to divide up the Crown into departments. He would make an order relieving the defendants, so long as the premises were in the occupation of the Office of Works, from paying rent in excess of the payments made to them by the Losses Commission.

It is said, and I think that it is said rightly, that at any rate ROWLATT, J. decided that, if he made an order (it may have been an imperfect report), the Courts (Emergency Powers) Act, 1917, s. 1 (2), applied to the Crown in the sense that it applied to a contract to which the Crown was a party. That Act of 1917 dealt with the case of contracts which, owing to a restriction or direction given under the Defence of the Realm Act or regulations, or owing to the fact that the Crown had seized or was using the premises or shops, could not be enforced without serious hardship, and that Act empowered the courts of this country to give what the courts thought appropriate relief. There is no doubt that ROWLATT, J., if he is rightly reported, thought that that section would have applied to a contract to which the Crown was a party. It is really sufficient for the purpose of this case for me to say that neither ROWLATT, J., nor anyone else has ever decided that the section of the Courts (Emergency Powers) Act, 1914, to which I have referred, affected the Crown or applied to it so as in any way to diminish its rights to recover taxes, and on that ground alone, of course, the decision of ROWLATT, J., in *A.-G. of Duchy of Lancaster* v. *Moresby* (6) is distinguishable. At any rate, looking at all those decisions and applying the analogy of the Debtors Act, which I think is not very far away from the present case, the Bankruptcy Acts, also not very far away, and the winding-up provisions in the original Companies Act—none of them very far distant from the subject-matter with which I have to deal —I think I am bound to say that this Act of 1939 is an Act which, if applied to the Crown, would clearly divest it of, or diminish in some way, the Crown's property, interest, prerogative or rights, and it is not necessary for this purpose, I think, for me to say which of that category I think is affected. I think that very likely all of them would be. For that reason, I do not feel myself bound by the decision of ROWLATT, J., in dealing with the Courts (Emergency Powers) Act, 1917, and, since that is so, then, I think, on the analogy of those cases dealing with those not dissimilar provisions, I am bound to say that the Crown here is not affected by the Courts (Emergency Powers) Act, 1939. There are, of course, other difficulties in *A.-G. of Duchy of Lancaster* v. *Moresby* (6). To begin with, it did not deal with a debt due to the Crown at all. It dealt with costs. However, I cannot say that I agree with it, if it purports to decide, quite apart from principles of procedure, that a subject can rely upon that section to suspend or annul a contract with the Crown under the section which is contained in the Act of 1917. However, this, of course, is not a case of a contract with the Crown. It is a case of a debt due to the Crown, not under contract, but by way of tax. It is a debt, and not a contract.

My attention has been called to *Magdalen College, Cambridge Case* (7). Many reasons were given in this case for the decision in that case, which was to the effect that the master and fellows of Magdalen College, Cambridge, had no right to divest themselves of certain property, which they had endeavoured to do by the process of conveying it to the Queen—Queen Elizabeth, I suppose—not for the Crown, as it happened, but for some other purpose, and it is apparent from the case that the conveyance to the Crown, or what was the form of the conveyance in those days to the Crown, was made in order, I suppose, to evade the

Act which forbade bodies like this to get rid of their property. Many reasons were given by the Chief Justice for holding that that disposal of their land was void, but it is at any rate clear that one alone would justify it and would not involve some of the discussions which took place and some of the reasons given by the Chief Justice in the course of his judgment, and that reason is the simple one that the Act of Parliament forbade the master and fellows of the College to divest themselves of their property, so it was not really an Act affecting the Crown. That in itself was enough. However that may be, I feel that this principle has now been discussed and applied, or not applied, in a number of decisions which have taken place in the last hundred years, and the rule is now, as I understand it, well laid down and clear, the rule being that, if an Act of Parliament would otherwise divest the Crown of its property, its rights, its interests or its prerogative, then it is not to be construed as applying to the Crown unless the Crown is specifically mentioned. If that be the test, I have looked at the Act, and nobody has drawn my attention, because nobody can draw my attention, to any special words naming the Crown. It is also clear that there is no necessary implication to be drawn from any of the words of the statute so as to involve the Crown. That being so, I must answer the question in this way. I must declare that the informant may proceed to execution upon, or otherwise to enforce, this judgment without further leave. I make the declaration in the form in which it is asked for in the case, and that is, as I understand, the agreed case, so that there is no question as to what is the appropriate relief.

Solicitors: *Solicitor of Inland Revenue* (for the informant); *James Turner & Son & Whitehouse* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN A/S. TANK OF OSLO AND AGENCE MARITIME L. STRAUSS OF PARIS.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **November 21, 22, 1939.**]

Shipping—Charterparty—Ship to "proceed (as ordered on signing bills of lading) direct to one safe port"—Option to discharge at two safe ports for small additional freight charge—Option exercised before bills of lading signed but by mistake not communicated to master or charterers' factors at loading port—Master signing bills of lading for one port only—Meaning of words "on signing bills of lading"—Mistake—Estoppel.

The respondents chartered the ship James Hawson to proceed to Philadelphia, there load a cargo of oil from the charterers' factors, and then "proceed (as ordered on signing bills of lading) direct to one safe port east coast United Kingdom or on the Continent." The charterparty contained a clause giving the charterers the option of discharging at two safe ports as mentioned above, and, in the event of this option being exercised, they were to pay a small amount of extra freight. After considerable correspondence between the parties, it was finally agreed, on the day before the ship arrived at Philadelphia, that the charterers, in exercise of their option, should discharge first at Bordeaux and then at Havre. This arrangement, however, was not notified by the owners to the master, or by the charterers to their factors, and accordingly the master, on arriving at Philadelphia, cabled the owners' agents stating his sailing date, and adding that Havre was the only discharging port. He subsequently signed bills of lading for this port. The owners' agents, on receiving this cable, suspected that a mistake had been made, and, after various communications had passed between the parties, the ports of discharge were finally verified, and the master was ordered to proceed accordingly. It was thereupon contended by the owners that there had been no proper exercise of the option, as the words "proceed (as ordered on signing bills of lading) direct to one safe port" must be construed strictly, and meant that the order had to be given to the master while he was in the act of signing the bills of lading, and therefore could only be given by the factors at Philadelphia:—

HELD: there was nothing in the charterparty which required that the option should be exercised at the moment of the signing of the bills of lading. The option was, therefore, duly exercised.

Decision of ATKINSON, J. ([1939] 2 All E.R. 585) *affirmed.*

[**EDITORIAL NOTE.** The general rule for the construction of documents is that the grammatical and ordinary meaning of words must be adhered to, but, where that leads to a capricious and irrational result, the rule may be departed from. This departure is more easily made in a commercial document, in which words and expressions have to be given a reasonable meaning. It must be emphasised that in the present case the contest is solely between the shipowners and the charterers. No question of the rights of third parties arises.

AS TO CONSTRUCTION OF CHARTERPARTIES, see HALSBURY, Hailsham Edn., Vol. 30, pp. 365-370, para. 542; and FOR CASES, see DIGEST, Vol. 41, pp. 305-309, Nos. 1670-1703.]

APPEAL by the claimants from a judgment of ATKINSON, J., dated Apr. 18, 1939, and reported [1939] 2 All E.R. 585, where the facts are fully set out.

Sir Robert Aske, K.C., and *H. M. Pratt* for the appellants.

Valentine Holmes for the respondents.

Aske, K.C.: The ship having issued a bill of lading to go to one definite port, she cannot go to any other without all the consequences of a deviation ensuing. The umpire was right in holding that, on the true construction of the charterparty, the time for the exercise of the option of fixing the port of discharge was the date of signing the bill of lading. In view of the subsequent bill of lading, the purported exercise by the charterers before the ship reached Philadelphia was a mere nullity.

Holmes: There is nothing in the charterparty which prevents the charterers from exercising their option for two ports before the ship reaches the port of loading, and, once they have done so, the signing of the bill of lading amounts to no more than the giving of a receipt for the goods by the master. From the moment the charterers exercised their right to name two ports, the owners were admittedly entitled to extra freight.

SCOTT, L.J.: In this case, the appellants are shipowners and the respondents are charterers. Under the charter, a Norwegian tanker was chartered to load in the United States a cargo of oil or petroleum spirit of sorts. The charter contains an arbitration clause, and the dispute between the owners and charterers in this case was referred to arbitration, and the umpire has stated a case raising the questions of law on which our decision depends. The charterparty is a tanker charterparty in English. It does provide that the contract shall be governed by the laws of the flag of the carrying vessel, which in this case was Norwegian, the ship being owned by a Norwegian company. No evidence was given of any difference between English law and Norwegian law, and, therefore, the court applies English law to the solution of the problems to which it has to address its consideration.

The dispute is as to whether, when the ship sailed from the American port of Philadelphia for Europe, she was under obligation to go to two ports on this side—namely, Bordeaux and Le Havre—or whether, as the owners say, she was under obligation to go to Le Havre only. The dispute arose in this way. The charter contained a provision that the ship should load the cargo from the factors of the charterers:

> . . . and being so loaded shall therewith proceed (as ordered on signing bills of lading) direct to one safe port east coast United Kingdom or on the Continent Bordeaux/Hamburg range.

The words down to "direct to" are in the printed form of charter, and the additional words which I have just read—namely, "one safe port east coast United Kingdom or on the Continent" are in type. Gummed on were three additional typed clauses, of which only that numbered 26 is relevant to the dispute. Cl. 26 provides as follows:

> Charterers have the option of discharging at two safe ports as above and in the event of this option being exercised charterers are to pay extra freight as follows: 6*d.* per ton on the whole cargo shipped for two ports on the same coast and in the same country. Ports between Bordeaux and Dunkirk to be considered as on the same coast. 1*s.* per ton on the whole cargo shipped for two ports on different coasts or in different countries.

Bordeaux and Le Havre both being in France, the 6*d.* per ton would be the correct extra freight on the exercise of that option by the charterers.

What happened was that, shortly before the loading of the ship at Philadelphia, the sailing date being Jan. 23, as it turned out, the charterers had intimated to the shipowners some weeks before that they desired to exercise the option and have the ship go to two ports. The phrase "two safe ports as above" I think refers to the typewritten words in the clause following after the printed words ". . . proceed (as ordered on signing bills of lading) direct to one safe port. . . ." It means that the two safe ports must be within the range there specified "as above." The charterers wanted the ship to go to Bordeaux first and then to Le Havre. The charterers are a firm in Paris. The shipowners wanted the order of ports to be Le Havre first and then Bordeaux. Correspondence took place between them as to whether the rotation should be the one which the charterers desired or the one which the shipowners desired. The

charterers insisted on their rotation—namely, Bordeaux first—and the shipowners agreed to comply with their wishes. That is all that happened on this side of the Atlantic, but, on the other side of the Atlantic, when the cargo had been loaded from the factors of the charterers, an American company named the Atlantic Refining Co., that company tendered the
A bills of lading as factors of the charterers, and only one bill was tendered. That bill of lading provided that the ship should proceed to Le Havre only, and nothing was said in it about two ports or about Bordeaux. After the ship had sailed, the owners and charterers on this side learned that only one port had been put in the bill of lading. Then a corres-
B pondence took place between them, and the shipowners agreed with the charterers that the ship should proceed to Bordeaux first and then to Le Havre, but they accepted the charterers' offer of a banker's indemnity against risks which the shipowners might incur by changing the ship's voyage as specified in the bill of lading, and the shipowners required
C them to pay any extra costs to which the shipowners were put by the change, in addition to the 6*d*. per ton extra for the option of going to two ports.

The matter went to arbitration, as I have said, and the umpire decided that the charterers were liable under the arrangement made, because they
D had no right, after presenting the bill of lading for one port, to call upon the shipowners to send the ship to two ports. The umpire decided that the correspondence which took place before the loading of the ship was only what he called a provisional exercise by the charterers of their right of requiring the ship to go to two ports. He took the
E view that, under the charterparty, the printed words "(as ordered on signing bills of lading)" made that moment of time the appropriate moment for the exercise of the option for the two ports, and that, consequently, the intimation given by the charterers by correspondence before the ship sailed that they wished it to go to two ports was merely
F a provisional exercise of the option, so that, when their factors tendered the bill of lading for one port, that was the definitive exercise of the option. He accordingly decided in their favour, but left these two questions to the court:

> Whether upon the facts as found by me and upon the true construction of the
> G documents: (1) Orders for the discharging port or ports must be given at the time of signing bills of lading. (2) When bills of lading are presented by the charterers' factors indorsed for a different destination, the charterers have thereby altered or waived any earlier orders given by them or are estopped from denying that the destination so indorsed is the proper one.

He says that, if the court finds that the answer to the first question
H should be in the affirmative, or that the answer to the first question should be in the negative and the answer to the second question should be in the affirmative, then he gives the shipowners the sum of £301 odd and costs, but that, if the court answers both questions in the negative, then he gives the charterers the costs, with nothing to pay by way of damages or indemnity to the owners.

The question, therefore, is a very short one, and though at first I was inclined to agree with counsel for the appellants in his argument that the interpretation of the charter required the conclusion that the exercise of the option for two ports must be at the time of signing bills of lading, I have come to the conclusion that that argument is wrong, on the ground pointed out by counsel for the respondents—namely, that it is necessary to distinguish between exercising the option for two ports and the naming of the particular ports which has to be effected according to the charter on signing bills of lading. Counsel for the respondents further submitted that, under the charter, the charterers had an absolute right to say that the ship should go to two ports, without naming what ports, at the time when they exercised that right—called an option in cl. 26—and that, when they had exercised it, in accordance with the ordinary rule about options in contracts, the contract then came to be *ipso facto*, by the exercise of that right intimating to the owners what their exercise was—namely, two ports—a charter for two ports, and that, when that had happened, it was then necessary to approach the question as to what was the effect, in a charter for two ports, of the charterers' factors tendering for signature a bill of lading for one port.

The first point to realise is that, as between the charterers and the shipowners, the bill of lading, when signed by the master, was a mere receipt for the cargo loaded, and did not alter the contract as between shipowner and charterer. That is a matter of law. Then, in addition, there is this point of fact. In the correspondence which passed between the charterers and the shipowners through the owners' various agents in London and Oslo, the charterers had not only said: "We exercise the option for two ports," but they had also said: "We exercise the option for the two ports of Bordeaux and Le Havre." The shipowners clearly assented to that exercise of their option, and, as between the shipowner and the charterer, I think it was at least common ground—possibly a binding contract also—that the ship should go to these two ports in that order.

That being so, what is the effect of the charterers' factors tendering the bill of lading for one port? Clearly that happened through a mistake, for which, no doubt, the charterers were primarily responsible, in that they had not told their factors to make out the bill of lading for two ports. Then, secondly, it was a mistake on the part of the master. He signed that bill of lading because he had not heard from his owners that the option for two ports had been exercised, and, therefore, looking at the charter, thought it was only a charter for one port, and, consequently, had no reason to suppose that the naming of one port only in the bill of lading was a mistake. Correspondence took place afterwards which has no bearing at all on the question of liability, because it merely relates, in my view, to the amount payable in case the owners were entitled to hold the charterers, as they did, to the one port named in the bill of lading. As a matter of fact, in this case the one bill of lading did not leave the possession of the charterers or their agents at all, and the risk of third parties taking one proceeding or another in consequence of the bill of lading not corresponding to the actual voyage of the ship never arose. However, we need not in this case consider the rights of third parties which might have accrued, since there is no evidence before the umpire that any did accrue. On the contrary, the evidence was that the bill of lading remained a receipt, and nothing more.

That is the whole story, except the conclusion. In my view, in this particular case, and on these particular facts, the option for two ports was duly exercised by correspondence. There is nothing in the charter which compels that exercise at the moment of signing bills of lading, because I think that that clause relates only to the naming of a port or ports, and, since the bill of lading was, as between shipowners and charterers, not a new contract at all, but only a receipt by the master for the charterers' goods, in my opinion, it had no operative effect at all as between these two parties.

It follows from that that my judgment must be for the charterers and against the shipowners upon the questions asked, and they will be answered, as I have indicated, in accordance with the judgment given by ATKINSON, J., below. He took the view that the umpire was wrong in his interpretation of the charter, and that the position was one in which the charterers were right. I think that he made certain minor slips in regard to some of the correspondence, but in effect the judgment which I have just delivered is to agree with the judge in the conclusion at which he arrived. Therefore, that will be a dismissal of the appeal.

CLAUSON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Sinclair, Roche & Temperley* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

FRANCIS *v.* SQUIRE.

[KING'S BENCH DIVISION (Asquith, J.), **November 24, 27, 1939.**]

Landlord and Tenant—Lease—Covenant to pay all assessments, impositions and outgoings whatsoever—Road charges—Charges not paid by landlord at date of issue of writ—Right of landlord to recover charges.

The plaintiff was the landlord and the defendant the tenant of certain premises at a yearly rental, the defendant having covenanted, *inter alia,* "to bear pay and discharge all existing and future rates taxes assessments duties impositions and outgoings whatsoever imposed or charged upon the demised premises." A sum of £133 13*s.* 3*d.* was imposed upon the premises for road charges. The defendant admitted that, on the wording of the covenant, he was liable for these charges. He set up two defences. First, he alleged a precedent oral agreement exempting him from liability and claimed rectification of the lease, but this was overruled on the facts; secondly, he alleged that, as in fact the plaintiff had not at the date of the issue of the writ paid the charges to the local authority, his liability towards the plaintiff had not matured :—

Held : the defendant was liable to pay the amount of the charges to the plaintiff, because the latter was liable to pay them to the local authority, even though he had not yet done so.

[**EDITORIAL NOTE.** The liability of the tenant under the covenant to pay is admitted so far as a court of first instance is concerned. The question here debated is whether the landlord can obtain judgment for the amount of the charges before he has actually paid them; and it is decided that he can.

As to Incidence of Outgoings, see HALSBURY, Hailsham Edn., Vol. 20, pp. 187-195, paras. 205-212; and for Cases, see DIGEST, Vol. 31, pp. 294-300, Nos. 4396-4455.]

Cases referred to :

(1) *Loosemore* v. *Radford* (1842), 9 M. & W. 657; 26 Digest 127, *908*.

(2) *Lethbridge* v. *Mytton* (1831), 2 B. & Ad. 772; 17 Digest 176, *799*; 9 L.J.O.S.K.B. 330.

Action for the recovery of £133 13*s.* 3*d.*, being an apportioned amount of road charges charged on premises demised by the plaintiff to the defendant and claimed under a covenant whereby the latter had undertaken "to bear, pay and discharge all existing and future rates taxes assessments duties impositions and outgoings whatsoever imposed or charged upon the demised premises. . . ."

Valentine Holmes for the plaintiff.

H. G. Robertson for the defendant.

Asquith, J. : On Mar. 27, 1935, the plaintiff leased to the defendant certain premises consisting of a house called Torwood and an adjoining orchard in Buckinghamshire. The lease reserved a rent of £90 per annum payable quarterly, and contained, amongst other covenants, one providing that the tenant was to

> . . . bear pay and discharge all existing and future rates taxes assessments duties impositions and outgoings whatsoever imposed or charged upon the demised premises or upon the owner or occupier in respect thereof or payable by either in respect thereof except landlords' property tax.

The premises in question abut on a private road, and in Oct., 1936, the Buckinghamshire County Council resolved that certain work should be done in connection with the conversion of this road into a public road. The council acted under powers granted to it by the Private Street Works Act, 1892. By that Act, it is provided that the council may recover the cost of such works from the freeholder. The amount to which each frontager is liable is apportioned on the basis of his frontage, and the owner of that frontage is liable to pay. The works in this case were completed in early April—I think on Apr. 14—and on Apr. 14 a final apportionment was made under sect. 12 of the Act, apportioning some of the £4,000 which the scheme involved altogether, £75 18*s.* 10*d.* to the orchard and £57 14*s.* 5*d.* to the house Torwood itself. By notices of May 2, the council notified the plaintiff of this apportionment, and informed him that the premises stood charged with those respective amounts as from the date of the final apportionment. The plaintiff, claiming that these sums were assessments or impositions or outgoings within the covenant which I have read, claimed payment A thereof from the defendant. The defendant, after a good deal of correspondence, finally refused to pay. The defendant had meanwhile tendered the rent of £22 10*s.* per quarter for the quarters of Michaelmas, 1938, Christmas, 1938, and Lady Day, 1939. The plaintiff declined to accept these instalments of rent, fearing—I think without B any reason—that, if he did so, he might be taken to have waived the rights he was asserting to insist on the payment of the road charges.

The writ was issued on Mar. 29, 1939, claiming under two heads. It was claiming, first, the total amount of the road charges—namely, £133 13*s.* 3*d.*, with interest at 4 per cent. from Apr., 1938, making in all C £138 15*s.* 5*d.* As I have said, the plaintiff was tendered or offered the rent for these three quarters, and he refused it. When the action was started, the defendant paid the money into court with an admission of liability. That was before delivering his defence. When he delivered his defence, he set up a plea of tender, and said he had brought the money D into court. The money was taken out of court after it was paid in, and no question arises under this head except as to costs. It seems to me that a payment into court with an admission of liability is consistent with setting up a defence of tender, and, as far as costs are concerned, I think that the costs, if there are any separate costs of this issue, ought to E follow the rule which applies to payments into court with an admission of liability when the money is taken out.

The other issue—the important one in the action—is as to liability for the road charges. The defence here falls into two sections. First of all, the defendant admits, on the wording of the covenant as it stands, F and upon the authorities as they stand, that it is impossible for him to contend with any hope of success in this court that the road charges are not assessments, impositions or outgoings within the covenant and sums which the defendant was liable to pay if the covenant applies, but he desires to keep the point open in the event of an appeal to a court upon G which those authorities are not binding. What he does raise upon this assumption that the covenant is binding is a contention as to the amount of damage. He argues that the plaintiff cannot, assuming the covenant to apply and to have been broken, recover from the defendant any sums except such as he himself has actually had to pay, and has paid, to H the county council before the issue of the writ. That contention I will deal with in a moment. The other point he raises is this. He asks for rectification of this part of the lease. He claims that an oral agreement was made, before the lease was drafted or engrossed, whereby the tenant was to bear only such rates and taxes as are usually borne by the tenant under a lease for a short term. In evidence, the defendant said that it was orally agreed that he should pay only the usual rates and taxes, and he contends that this provision ought to have been embodied in the lease, and that cl. 1 (2) did not give effect to the oral agreement between the parties which preceded it. He accordingly counterclaims for rectification in the sense indicated, and he asks for a declaration that sums assessed or apportioned under the Private Street Works Act, 1892, are A not the usual rates and taxes in a lease for a short term.

As regards the plea for rectification, I do not think the defendant has established the oral agreement on which he relies as the foundation of his claim.

The only question remaining is one to which I referred a little while B ago—namely, whether or not, under cl. 1 (2), the plaintiff is entitled to recover the road charges from the defendant, notwithstanding that, at the time of the issue of the writ, he had not paid any part of them, and, between the writ and the hearing, had paid only some £29 odd out of a sum of £138 odd. It is argued by counsel for the defendant that the C defendant is not liable, because this is a covenant for breach of which damages must be proved, and only sums which can be shown to have been disbursed in consequence of the defendant's failure to discharge his obligations can be recovered, so that a liability which has not yet matured in payment is, according to that argument, excluded. It does not seem D to me that that contention is well-founded, and there appears to me to be authority against it. First of all, leaving aside the particular form of this covenant, it is quite plain that, not only where there are engagements to indemnify, but also in all other kinds of cases, a plaintiff can often recover a sum of money without showing that he has yet had to E disburse it by showing that, through the defendant's default, he has come under a liability to disburse it. The instance cited by counsel for the plaintiff is that of an ordinary running-down case, in which a plaintiff is plainly entitled to recover the amount for which he has become liable to a doctor for fees without showing he has actually paid those F fees. I spoke of authority just now, and two cases have been cited—namely, *Loosemore* v. *Radford* (1) and *Lethbridge* v. *Mytton* (2). The second case is in point for a reason which I have not yet mentioned, and that is that, upon a final apportionment, a charge attaches immediately to the premises for the sums assessed upon them. That charge attaches G to the freehold, and, that being so, the obligation imposed by the covenant in this case was in effect to relieve the premises of that charge. In *Lethbridge* v. *Mytton* (2), the facts as stated in the headnote were these:

> Defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to H the amount of £19,000 within a year:
>
> HELD, that on his failing to do so, the trustees were entitled to recover the whole £19,000 in an action of covenant, though no special damage was laid or proved..

Thus, here the charge attached, and the defendant came under a liability to pay £138 odd, which would, in effect, clear off that charge. He failed to do so, in breach of his covenant, and the whole amount here, as in the case which I have cited, seems to me to be properly recoverable by the plaintiff by reason of that default. The other case cited is perhaps also worth referring to, *Loosemore* v. *Radford* (1), in which the headnote is as follows:

> A The plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default:—
>
> HELD, in an action on this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages.

Both of those cases seem to me to be in point, and, accordingly, I must B reject the contention that, because the plaintiff has not, or had not, disbursed anything at the time of the issue of the writ, he is, therefore, debarred from recovering the full amount of the road charges as damages for breach of this covenant. It follows that there must be judgment for the plaintiff with costs, and the counterclaim is dismissed, also with C costs.

Judgment for the plaintiff with costs. Counterclaim dismissed with costs.

Solicitors: *George L. Barnett & Co.* (for the plaintiff); *Simmons & Simmons* (for the defendant).

D [*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

EASDOWN *v.* COBB.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen and Lord E Wright), **June 27, 1939.**]

Workmen's Compensation—Workman—Farmer—Deed of assignment for benefit of creditors—Trustee appointed by creditors—Farmer continuing to manage farm—Accident—Whether contract of service with trustee—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 3 (1).

F The applicant and his brother, who were carrying on a farm in partnership, fell into difficulties and called a meeting of their creditors. At that meeting, which took place on Aug. 12, 1937, it was proposed that the applicant should be employed as manager of the farm at a salary to be eventually decided by the committee of inspection. On Aug. 16, a deed of assignment was duly executed by the applicant and his brother, and sent to the defendant, the trustee under the deed, who was then G on holiday in Scotland. The assignment was completed on Aug. 18, and on Aug. 19 the applicant, while at work on the farm, met with an accident, in respect of which he claimed workmen's compensation. There was an agreement that the applicant should be paid wages at the rate of £2 12*s.* per week, but it was contended that the applicant was not working under a contract of employment, and was not, therefore, a workman within the meaning of the Workmen's Compensation H Act, 1925, s. 3 (1). The county court judge awarded compensation on the ground that the applicant was the trustee's servant, but on appeal the Court of Appeal reversed his decision, holding that there was no evidence of a contract of service on the day of the accident. Thereupon this appeal was brought:—

HELD: there was evidence upon which the county court judge was entitled to find as a fact that the applicant on the relevant date was a "workman" within the meaning of sect. 3 of the Act of 1925.

[**EDITORIAL NOTE.** The question in this appeal is treated as one of fact, but it is a little curious that one of the partners in a partnership should become an employee of the partnership entitled to compensation.

AS TO WORKMAN, see DIGEST, Vol. 34, pp. 239-244, Nos. 2043-2078; and see, also, WILLIS'S WORKMEN'S COMPENSATION, 32nd. Edn., pp. 168, 169.]

APPEAL by the workman from an order of the Court of Appeal (GREER, A
SLESSER and MACKINNON, L.JJ.), dated June 24, 1938, reversing an award, dated May 18, 1938, made by His Honour JUDGE CLEMENTS in the Rochester County Court.

Hon. Sir Stafford Cripps, K.C., and *Francis A. Hopkinson* for the appellant. B

Donald McIntyre for the respondent.

LORD ATKIN: My Lords, this is a simple case, as I think it appears to all your Lordships, in which I have the misfortune to differ from the conclusion which was arrived at by the Court of Appeal, who reversed C
the county court judge on a question which I think, in the ultimate analysis, turns out to be purely a question of fact. The claim is brought under the Workmen's Compensation Act, 1925, and it might be as well to refer to the relevant section of the Act, because the question which arises is whether or not the appellant was a workman within the meaning D
of sect. 3 of that Act. In that section, the expression " workman " is defined as meaning:

> . . . any person who has entered into or works under a contract of service or apprenticeship with an employer . . .

The appellant, George Easdown, in partnership with his brother E
Walter, had been carrying on a market-garden or farm of about 35 acres at Mid-Higham, near Rochester. In 1937, unfortunately, the brothers had got into financial difficulties. They called their creditors together, and a meeting of creditors took place on Aug. 12, 1937, at the offices of Messrs. Cobb, who are well-known estate agents in that district. The F
proposal was that there should be a deed of assignment. Nothing was eventually concluded at that meeting, but it was proposed by the creditors that George Easdown should be employed as manager at a salary which the committee of inspection would eventually decide. A question still arose, however, as to whether or not there should be a G
composition, and nothing was decided until a day or two later, when the brothers decided to execute a deed of assignment, and Robert Cobb, the senior partner in the firm of estate agents, was to be the trustee. On Aug. 16, a deed of assignment was duly signed by the two brothers and sent to Robert Cobb, who at that time was enjoying what I have no H
doubt was a well-earned holiday in Scotland. The brothers continued on the farm, George Easdown managing it and the two or three farm servants continuing their respective employments. Unfortunately, on the third day, Aug. 19, George Easdown, while carrying on his work at the farm, met with an accident. He fell off a hay cart and seriously

injured his knee. There is no question about his being incapacitated, and there is no question at all but that, if he were a workman, he would have a claim for compensation against his employers.

Was he or was he not working at this time under a contract of service? The facts are that, after the accident, he continued to be manager. He went home after he had been treated in hospital, and he apparently managed the farm, though he was not able to work on it. He prepared accounts, and he duly sent accounts of wages to Robert Cobb's firm. Later, he had an interview with one Strouts, a clerk in the employment of Robert Cobb's firm, who said that the accounts were not quite satisfactory and that he wanted some further detail. On Sept. 24, the appellant received a letter signed by H. & R. L. Cobb saying that it was necessary to make a valuation, and adding:

> With regard to the wages paid, we shall be glad to receive details as soon as possible.

The "wages paid" referred to an account of wages which the appellant had sent to Messrs. Cobb on Sept. 20, being the accounts for the month from Aug. 16 to Sept. 11, setting out wages for each week paid to the appellant's brother, to Mrs. Kent and Marchant, to W. Wright and others, and adding at the end: "Self, one month, £10 8*s*." A question had arisen between the appellant and the representative of Messrs. Cobb who had called upon him as to the amount which the appellant, George Easdown, should receive, and the letter of Sept. 24 says:

> As far as your salary is concerned, we have no objection to your drawing £2 12s. per week for the time being.

My Lords, in those circumstances, how can it be said that there was no evidence that this man was employed? As from the date of the signing of the agreement, which was completed on Aug. 18, but by which, on Aug. 16, subject to acceptance by the trustee, the brothers had divested themselves of every interest in the farm, what was the position of the trustee? Obviously, he knew that the farm had to be carried on. He knew that there would have to be farm servants. There were horses on the farm, and he knew that the stock would have to be fed and dealt with, and that the whole of the market-garden would have to be attended to, and that quite obviously someone would have to manage it. All that must have been thoroughly well known to him and must have been contemplated by him at the time when he took over the position of trustee. He took it over under a deed by which he had power, with the permission of the committee of inspection, to appoint the debtors—and, with respect to the argument of counsel for the respondent, I think that means the debtors or either of them—as managers or servants. The fact is—and this must have been known to the respondent—that the farm had to be run by servants and by a manager, for the respondent was not managing it himself. It appears to me perfectly plain that the fact that he agreed, as he did on Sept. 24, that the appellant should receive a "salary" of £2 12*s*. per week as from Aug. 16 is ample evidence that he had intended that the appellant, George Easdown, should be in his employment as manager from that date. That is a fact which the judge has found, and he had before him a piece of evidence which counsel for the respondent has attempted to explain, but which, on the face of it, seems to me to be quite plain. I read from the note of the county court judge : A

> Respondent cross-examined : Applicant was managing the business after Aug. 16.

Then there was a suggestion made which hardly deserves to be treated seriously—namely, that, when the respondent paid George Easdown £2 12*s*. per week and called it " salary," he was in fact only paying B him a " compassionate allowance "—a thing which he had no conceivable right to do, because he would then be handing over charity at the expense of the creditors.

My Lords, in those circumstances, it appears to me that the county court judge was completely justified in coming to the conclusion at which C he did arrive. However, that is not the question for us. The question is whether or not there was any evidence upon which he could find that there was here a contract of employment as from Aug. 16. My Lords, I put it on those bare facts, and it seems to me to be quite plain that there is quite sufficient evidence to justify his finding. I prefer not to D put it on the ground which was suggested in the first instance—namely, that there was here a definite agreement at the creditors' meeting to employ the appellant, because, as was pointed out by counsel for the respondent, that was before there was a deed of assignment, and I think that that would have created a difficulty, though no doubt it afforded E very strong evidence that the creditors, and Robert Cobb, who was in the chair, would know that the business required a manager. That makes it all the more easy, in my opinion, for the county court judge to come to the conclusion that that would have been well within the knowledge of Robert Cobb when he signed the agreement. F

My Lords, for these reasons, I find it quite impossible to concur in the view of the Court of Appeal, which seems to me to be that, until there was some actual assent, by fixing the salary or otherwise, by Robert Cobb, there was no service at all. I find it quite impossible to imagine what I ventured to call in the course of the argument a vacuum of that G kind existing in the farm, in which apparently nobody at all would be employed or would be in anybody's service until the trustee had actually signified his assent to those actual people being employed. I venture to suggest to your Lordships that there was a complete contract which was entered into by the people tendering their service, the trustee knowing H that they would be employed and assenting to their employment as he did at a later time, and assenting to it on the terms that they were employed from the very beginning. With great respect, there seems to me to be ample evidence on which the judge could come to that conclusion on this question of fact, and ample evidence that it ought not to be disturbed. Therefore, I move your Lordships that this appeal be allowed, and that the award of the county court judge be restored.

LORD RUSSELL OF KILLOWEN: My Lords, I agree. The only question for our consideration is whether or not there was evidence in A this case upon which the arbitrator could find as a fact that the appellant on the relevant date—namely, Aug. 19, 1937—came within the definition of "workman" which is contained in sect. 3 of the Act of 1925. The relevant words are:

> . . . any person who . . . works under a contract of service . . . with an employer B . . . whether the contract is expressed or implied . . .

My noble and learned friend LORD ATKIN has detailed the evidence in the case, and I need not repeat that process, but, having considered the evidence, I feel no doubt that there was in this case sufficient—indeed, ample—evidence upon which the arbitrator could state, as he C did state in his judgment:

> I find as a fact that this man was employed as a servant, and therefore there must be an award.

That finding of fact, my Lords, should not have been disturbed by D the Court of Appeal, and I am accordingly of opinion that this appeal must be allowed.

LORD WRIGHT: My Lords, I also agree. The only question is whether or not there was any evidence upon which the county court E judge could come to the conclusion to which he did come. I think that there was ample evidence. The appellant was working as manager of the farm after the deed of assignment on the actual day of the accident, and, to my mind, it is impossible to hold, if all the facts of the case are looked at, that he was doing so without the knowledge, if not of the F respondent, at least of those whom he left in control of his affairs and representing him at the time. The case would have been absolutely unarguable if Robert Cobb had been on the spot. The fact that he was in Scotland when he signed the deed on Aug. 18 means only that he was leaving the conduct of the business, in the ordinary course, to his G representatives on the spot. I think that there was ample evidence to justify the finding of fact.

Appeal allowed with costs.

Solicitors: *H. Flint & Co.*, agents for *Thomas Church*, Gravesend (for the appellant); *William Charles Crocker*, agents for *Arnold, Tuff & Grimwade*, Rochester (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

APOSTOLIC THRONE OF ST. JACOB *v.* SABA EFF SAID.

[PRIVY COUNCIL (Viscount Sankey, Sir Lancelot Sanderson and Sir Philip Macdonell), **October 23, 24, 26, November 21, 1939.]**

Privy Council—Palestine—Money—Currency in which debt payable—Loan in French liras—Payments of interest on gold basis—Palestinian law.

In 1916, the appellant borrowed from the predecessor in title of the respondent 1,000 French liras on the security of a bond. Payments of interest, which were indorsed on the back of the bond, were made from time to time in Turkish liras, Egyptian liras, French liras, Egyptian piastres and Palestinian pounds, the last payment having been made on Aug. 21, 1931. It was contended that the appellant was bound to pay the value of the principal and interest on the date of repayment in Palestinian currency of 1,000 French gold napoleons. The appellant contended that he was liable to pay only at the tariff rate. The payments of interest up to 1931 were made on a basis compatible only with the contract being a gold contract, and not a currency one. By Palestinian law, a person is bound by his own admission, and may not retract an admission made with regard to private rights :—

HELD : the payments of interest amounted to an admission from which the proper inference to be drawn was that the contract was a gold one, and, as the appellant had done nothing to displace this inference, he must make repayment on a gold basis.

[EDITORIAL NOTE. The present case, as the judgment states, is outside the line of authorities recently decided on this subject. Though governed by Palestinian law, the case may, perhaps, show that such contract may have to be construed in the light of the payments of interest upon the principal. If these payments are made upon a gold basis, that may be sufficient to justify the construction of the principal contract which makes it a gold contract and not a currency one.

AS TO CURRENCY IN WHICH DEBT IS PAYABLE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 173, 174, para. 251 ; and FOR CASES, see Digest, Vol. 35, pp. 169-176, Nos. 13-63.]

Cases referred to :

(1) *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122 ; Digest Supp. ; 103 L.J.Ch. 85 ; 150 L.T. 281.

(2) *Feist* v. *Société Intercommunale Belge D'Électricité*, [1934] A.C. 161 ; Digest Supp. ; 103 L.J.Ch. 41 ; 150 L.T. 41.

(3) *Ottoman Bank of Nicosia* v. *Chakarian*, [1938] A.C. 260 ; [1937] 4 All E.R. 570 ; Digest Supp. ; 107 L.J.P.C. 15 ; 158 L.T. 1.

APPEAL from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated May 14, 1937, affirming the judgment of the District Court of Jerusalem, dated May 25, 1936. The facts are fully set out in the judgment which was delivered by VISCOUNT SANKEY.

Colin H. Pearson for the appellant.

Sir Thomas Strangman, K.C., and *Phineas Quass* for the respondent.

VISCOUNT SANKEY : This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated May 14, 1937, affirming the judgment of the District Court of Jerusalem, dated May 25, 1936, which ordered the appellant (hereinafter called the defendant) to pay to the respondent (hereinafter called the plaintiff) an amount in Palestine currency to be measured by the value on the date of payment of 1,000 French gold napoleons, with interest and costs.

The question raised by the appeal is the extent of the defendant's liability to the plaintiff as representing the estate of Yakoub Giries Said, deceased, on a bond dated Aug. 16, 1916. The plaintiff submits, and both the Palestinian courts have so held, that the defendant was bound under the bond to pay the value on the date of repayment in Palestine currency of 1,000 French gold napoleons, with interest from Aug. 21, 1931. The defendant admits liability to repay the principal of the loan and interest thereon from Aug. 16, 1931, as sums of Palestinian currency—that is to say, (i) for the principal, £P.791·282, and (ii) for the interest, £P.55·385 per annum.

The bond referred to was in the following terms:

> The Apostolic Throne of St. Jacob, Jerusalem.
>
> Aug. 16, 1916.
> No. 107.
>
> French L.1,000.
>
> DEBT BOND.
>
> Loaned for the needs of this Apostolic Throne, from Yakoub Giries Said of Jerusalem, only (1,000) one thousand French liras at an annual interest of 4% (four per cent.), and on condition that if he should claim the recovery of the capital on the expiration of one year, he shall notify us 3 months beforehand, and in confirmation whereof we gave this bond, sealed.
>
> SEAL (Signed) The Chief of the Holy Throne,
> DAVID WARTABET DERDERIAN.

It will be observed that the bond provided for interest at the rate of 4 per cent., but, by agreement between the parties, the rate of interest was increased in 1918 to 6 per cent., and a year later to 7 per cent. Interest was paid from time to time either in Turkish liras, Egyptian liras, French liras, Egyptian piastres and Palestine pounds, and the payments were indorsed on the back of the bond. No interest was paid after Aug. 21, 1931. On Oct. 28, 1935, the plaintiff commenced proceedings for the recovery of the amount due to him, and by para. 4 of his statement of claim he alleged:

> As can be seen from the bond the liability of the defendant is expressed in French liras which expression always had and can only have the meaning of French gold napoleons, and the claim is made accordingly, the value of the claim being calculated on the basis of the rate of gold napoleons at the time of lodging the action.

The defendant denied the allegations of the plaintiff, and in particular denied that the bond was given in respect of a loan in gold napoleons. The defendant also reserved the right to counter-claim for set-off against the account of the plaintiff certain overpayments which he alleged he had made.

The hearing in the District Court of Jerusalem took place on Apr. 9, 1936, the plaintiff contending that the bond indicated a debt of 1,000 gold napoleons, and he argued that the defendant was estopped by his own conduct from claiming that the debt was in other than gold napoleons. He drew attention to the payments made for interest and indorsed, as stated above, on the bond. The case was adjourned for a short time to enable the defendant to search the Turkish records for the exact text of the law enacted by the Ottoman government during the period of the Great War substituting paper currency for gold in Turkish dominions. The judgment of the court was given on May 25, 1936. It was brief, and in the following terms:

> The defendant is bound by the loan document and his subsequent admission by payment of interest on the basis of gold loan.
>
> Following decision in C.A. No. 85/32, the judgment must be given for plaintiff, amount of debt, 1,000 gold napoleons at the rate of exchange upon date of payment, with interest from Aug. 21, 1931, as agreed, to date of payment, provided the interest does not exceed the principal.

The defendant appealed, and, in his notice of appeal, advanced grounds many of which were abandoned as the case proceeded. Before this court, only three of these grounds were relied upon. It was pointed out that neither the word " gold " nor the word " napoleon " was mentioned in the bond. It was denied that there was payment of interest on the basis of a gold loan, and that the indorsement on the bond itself constituted such an admission, and it was contended that the only evidence available proved that interest was paid on the basis of a certain arbitrary or tariff rate, which, over the course of years, bore no relation to the fluctuating gold-exchange rate.

At the hearing in the Supreme Court on Apr. 22, 1937, the defendant expressly admitted, apparently for the first time, that he was liable to pay at tariff rate, and subsequently in this court he admitted his liability to repay the principal of the loan and interest thereon from Aug. 16, 1931, as sums of Palestinian currency (i) for principal, £P.791·282, and (ii) for interest, £P.55·385 per annum.

Their Lordships were referred, in an appendix to the case for the appellant, to various extracts from the Turkish, Egyptian and Palestinian currency laws, decrees and ordinances, but it is not necessary to set them out at length. By art. 1 of a draft decree concerning Turkish coinage in 1296 (1881), which was subsequently passed by the Chamber of Deputies, it is provided that the Turkish monetary unit is the gold pound of 100 piastres. By a Turkish ordinance of Aug. 22-24, 1914, it was provided that the Ottoman Bank would be exonerated of its obligation to redeem bank notes in gold for as long a period as that law should be in force. By a decree relating to the monetary system of Egypt, dated Oct. 18, 1916, it was provided in art. 1 that the monetary unit of Egypt is the Egyptian pound. The Egyptian pound is divided into 100 piastres. After the occupation of Palestine by the Allies, a notice was issued on Nov. 23, 1917, making Egyptian coins and bank notes legal tender. On Jan. 18, 1918, a notice was issued relating to acceptance of certain coins for purposes of receipts and payments, and it was provided as follows:

> The following are the official rates of conversion into Egyptian piastres of the coins mentioned below. On the basis of these rates these coins may be accepted for purposes of receipt and payment in addition to currency.
>
> (1) Coinage other than Turkish :—
>
> In addition to Egyptian currency the following may also be accepted for purposes of receipts and payments in the occupied enemy country. Gold at the following exchange : French 20 francs, 77·15 P.T. (Egyptian).
>
> (2) Turkish coins :—
>
> £ Turkish (Gold)—87·75 P.T. (Egyptian).

By a notice on Jan. 18, 1918, from the acting administrator of occupied enemy territory, the public was reminded that the Egyptian bank note was worth exactly its face value in Egyptian gold, silver or nickel currency, and that, on the basis of the above rate of P.T. 87·75 for the pound Turkish gold, the value of the 100 P.T. Egyptian note must be considered as 144 Turkish piastres gold.

The payments of interest indorsed upon the bond are as follow. The first two indorsements (the only indorsements which relate to the period prior to the British occupation) show that interest for the first year, i.e., from Aug., 1916, to Aug., 1917, was paid in Turkish liras. The second indorsement clearly means "20 French liras in its equivalent of 17·5 Turkish liras," as in the first indorsement. For the year Aug., 1917-Aug., 1918, interest was paid in Egyptian liras at the tariff rate for gold coins. For the year Aug., 1918 - Aug., 1919, the interest was actually paid in French liras. For the year Aug., 1919 - Aug., 1920, interest was again paid at the tariff rate for gold napoleons. For the year Aug., 1920 - Aug., 1921, interest was paid similarly, and again for the year Aug., 1921 - Aug., 1922. The payments were continued at the tariff rate for the years 1922-1923, 1923-1924, 1924-1925, 1925-1926, 1926-1927, 1927-1928, in each case the payment being 5,400 Egyptian piastres, being the equivalent of 70 gold napoleons at the tariff rate of 77·15 Egyptian piastres per gold napoleon. The remaining three indorsements represent similar payments for the years 1928-1929, 1929-1930, and 1930-1931, the payment being made in Palestine pounds, at the same tariff rate, with the necessary adjustment between the gold value of the Palestine pound and the Egyptian pound.

The judgment of the Supreme Court was given on May 14, 1937:

> The case came before the District Court on Apr. 9, 1936. The plaintiff's case was that the defendant was estopped from saying the transaction was not gold by the payments which were made and accepted on account of interest, these showing that the parties must have treated the loan as gold. This was done by showing that the payment of interest was calculated at the tariff rate under a public notice, dated Dec. 12, 1918, on the basis that the interest was payable on a gold loan.
>
> The defendant argued that the transaction could not have been gold as there was then no gold coin in circulation, and that, if it was in gold, the transaction was void, gold transactions being forbidden by law. He went on to say there was a definite issue of fact between the parties as to whether the transaction was gold.

Then SIR HARRY TRUSTED, C.J., proceeded as follows:

> I think that the fact that interest had been paid for a number of years upon a basis compatible with the loan being gold cast the onus of proof upon the defendant, and it is clear that he made no effort, by the production of his books or otherwise, to discharge that onus, and, although I do not think, upon the evidence, that the defendant was estopped from denying that the loan was gold, I think the District Court was entitled, in the absence of any evidence by the defendant, to hold that it was gold. This disposes of the first point raised for the appellant before us by Abcarius Bey—namely, that the onus was on the respondent (the plaintiff) to prove that he gave gold.

Counsel for the defendant argued before their Lordships that the loan was repayable in any currency legal at the time of repayment. He contended that the two questions for determination were (i) did the bond by itself show that the contract was, to put it briefly, a gold or a gold value contract ? and (ii) did the payment of interest show that the bond was a gold or a money contract ? Several cases were referred to, including *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (1), *Feist* v. *Société Intercommunale Belge D'Électricité* (2) and *Ottoman Bank of Nicosia* v. *Chakarian* (3), but none of these authorities A was in point in the present case, for reasons which will appear later.

In the view of their Lordships, the judgment of the Supreme Court was right upon the materials which were before it. With regard to the bond, the defendant submitted that the French lira or napoleon was a Turkish unit of account, and that there was no gold clause in the bond, B or any indication in it that repayment was required to be in gold, or in anything other than legal currency.

If the bond stood alone, and if attention were directed to the bond only, it might have been successfully contended that the contract was a currency contract as distinguished from a gold one. However, the C bond did not stand alone. The payments of interest were sometimes in Egyptian liras at the tariff rate for gold coins, sometimes actually in French liras, sometimes in Egyptian piastres equivalent in amount and value to gold napoleons, sometimes in Palestine pounds with the necessary adjustment between the gold value of the Palestine pound D and the Egyptian pound. These were admissions by the defendant by which he was bound.

The legal effect of admissions in Palestine is to be found in the Turkish Code (the Méjelle) which provides in art. 79 that a person is bound by his own admission, and, in art. 1588, that no person may validly retract E an admission made with regard to private rights. It is clear, as was held by both of the courts below, that these payments of interest show that the defendant, by his conduct over a number of years, admitted that the loan was one of 1,000 gold napoleons, and consequently he was prevented by such admissions from claiming that he could discharge his F liability other than by the payment of the amount claimed.

In order to counteract the effect of these admissions, the defendant contended before their Lordships that the interest had been paid, not on the basis of the gold rate, but on that of a tariff rate, which, he alleged, had borne no relation over the course of years to the gold rate. He G further alleged that the tariff rate for gold coins was not the gold exchange rate. Had the defendant been able to substantiate these points, or had he proved them in the District Court, he might have been in a position to displace the inference drawn in both courts from the payment of interest, but the difficulty in his way in the present appeal is that in H the court of first instance he made no attempt, either by the production of his books or otherwise, to displace the only inference which could be drawn from a proper consideration of the payments of interest indorsed upon the bond. Those payments indicated that the basis of the bond was compatible, and compatible only, with the loan being gold. Consequently, the Palestine courts were entitled, on the evidence which was before them, and, indeed, bound to hold that the loan was a gold one. In the result, their Lordships will humbly advise His Majesty to dismiss this appeal, and order the defendant to pay the costs of the appeal.

Solicitors: *Stoneham & Sons* (for the appellant); *T. L. Wilson & Co.* (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

H. C. & J. G. OUSTON *v.* G. SCAMMELL & NEPHEW, LTD.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 6, 7, 1939.]**

Contract—Agreement for the acquisition of goods—Price to be discharged "on hire-purchase terms"—Hire-purchase terms not settled by parties—Whether concluded agreement—Whether transaction a sale of goods—Sale of Goods Act, 1893 (c. 71), *s.* 4.

The plaintiffs entered into negotiations with the defendants to acquire from the latter a motor lorry, giving an old lorry in part exchange therefor. The parties were agreed as to the new lorry to be supplied, its price, the rebate in respect of the old lorry and further that the matter was to be concluded on hire-purchase terms; but the precise terms of the hire-purchase agreement were not settled. The defendants subsequently repudiated the transaction on the grounds (i) that there never was any concluded agreement at all between the parties, because the terms of the proposed hire-purchase agreement had not been settled, and (ii) if there was an agreement, it was unenforceable under the Sale of Goods Act, 1893, s. 4:—

HELD: (i) there was a concluded agreement. The fact that the actual terms of the hire-purchase had not been settled was irrelevant, and did not affect the main contract between the parties, which was that the defendants should put the plaintiffs in possession of the lorry, the plaintiffs discharging the payment therefor by one of the methods commonly known to business men as "hire-purchase."

(ii) the agreement was not a contract of sale.

[**EDITORIAL NOTE.** The question here is whether the terms are sufficiently settled so that it may be held that there is a completed agreement in law. This, of course, is not necessarily the same question as whether the terms are sufficiently stated so that there may be a proper memorandum of the agreement within the meaning of some statute. All that it is here necessary to show is that the parties were *ad idem*, and this may be so where the general and usual terms of the contract are merely stated as "c.i.f.," "hire-purchase terms", or the like.

AS TO ESSENTIALS OF AGREEMENT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 65, 66, para. 83; and FOR CASES, see DIGEST, Vol. 12, pp. 51-53, Nos. 277-298.]

Cases referred to:

(1) *May & Butcher* v. *R.*, [1934] 2 K.B. 17, n.; Digest Supp.; 103 L.J.K.B. 556, n.; 151 L.T. 246, n.

(2) *Foley* v. *Classique Coaches, Ltd.*, [1934] 2 K.B. 1; Digest Supp.; 103 L.J.K.B. 550; 151 L.T. 242.

(3) *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503; Digest Supp.

(4) *Re Vince, Ex p. Trustee in Bankruptcy*, [1892] 1 Q.B. 587; on appeal, *sub nom. Re Vince, Ex p. Baxter*, [1892] 2 Q.B. 478; 4 Digest 483, *4345*; 61 L.J.Q.B. 836; 67 L.T. 70.

(5) *Modern Light Cars, Ltd.* v. *Seals,* [1934] 1 K.B. 32; Digest Supp.; 102 L.J.K.B. 680; 149 L.T. 285.

APPEAL by the defendants from a judgment delivered by TUCKER, J., dated July 27, 1939. The facts are fully set out in the judgment of SLESSER, L.J. TUCKER, J., said in his judgment that he did not think he was bound to assume that a hire-purchase transaction necessarily involves a sale by the trader to a finance company and the release by the finance company of the article to the customer. He was not bound to take the view that the words of the agreement necessarily implied that it was essential that a three-cornered agreement should be entered into by three different parties, affording rights and imposing obligations on all three. The understanding was a condition precedent to a contract which was otherwise sufficiently clear and definite to become effective. If the defendants had not wrongfully repudiated the contract, the plaintiffs would no doubt have had to show, before they could enforce it, that the condition precedent had taken effect, and that the purchase price on hire-purchase terms over a period of years had in fact been obtained, or could be obtained. As, however, the defendants had repudiated the contract on wrong grounds, they could not rely on the necessity for the plaintiffs' showing that that condition had been fulfilled. The documents contained among them a sufficient memorandum to comply with the Sale of Goods Act, 1893, s. 4. The plaintiffs ought to have mitigated their damages at the time of repudiation, or very shortly afterwards, by taking the new van at the price at which the defendants were willing to supply it. They would not have been likely to get £100 for the vehicle in part exchange from other customers. His Lordship estimated the loss they had suffered at £50, and awarded this sum as damages, with costs. The defendants appealed.

R. F. Levy, K.C., and *Constantine Gallop* for the appellants.

Gilbert Beyfus, K.C., and *W. A. L. Raeburn* for the respondents.

Levy, K.C.: The agreement was to make an agreement. There was never to be a transaction of purchase and sale. There was to be one agreement only—namely, a hire-purchase agreement. The parties did not even decide whether there was to be a tripartite agreement for sale by the dealer to the finance company and then a hiring-out by them or whether there was to be a direct transaction between the dealer and the customer. None of the terms was agreed. Alternatively, if the parties intended to define the terms of the hire-purchase agreement, they did not do so sufficiently. The only express term was the duration—namely, 2 years. Neither the amount of each instalment nor the interest was stated, nor was any right of recaption given. Such a failure to define any particular term is fatal to a contract: *Re Vince, Ex p. Trustee in Bankruptcy* (4).

Gallop: If this contract is enforceable, then an open contract for hire purchase is possible. The forms of hire-purchase agreements, even though they take a certain number of well-defined shapes, still vary considerably one from another: *Modern Light Cars, Ltd.* v. *Seals* (5). These agreements cannot yet be included in the class of open contracts recognised by law, which includes such agreements as a lease subject to "the usual covenants," an open contract for the sale of land, and a contract of option under the Pawnbrokers Act, 1872.

A

MacKinnon, L.J.: Could it be suggested that in a contract for sale c.i.f., there is no sale until all the terms of the insurance policy are agreed?

Gallop: A contract c.i.f. means only that it is open to the seller in his B discretion to procure an effective insurance for the cargo. He fails to fulfil this obligation if he does not insure with a solvent company, or fails to cover the goods. Here there was no question of discretion, for neither party bound himself to accept any specific terms of hire purchase. The whole transaction was mere negotiation. The agreement did not C even lay down which party was under the obligation to ensure that hire-purchase finance was available. It is void for uncertainty.

Beyfus, K.C., was not called upon in reply.

Slesser, L.J.: In this case, two business firms purported to enter D into an agreement with regard to the acquisition by the plaintiff firm H. C. & J. G. Ouston, of a Commer motor lorry at a price of £268. As against that, the defendants were to be let into possession of an old lorry called a two-ton Bedford Luton van, and the plaintiffs were to be given credit to the extent of £100 of the £268 for that van by the defendants, E G. Scammell & Nephew, Ltd., who were supplying the new van.

The actual negotiations took place at interviews at some club of which the parties appear to have been members, and they find expression in a number of letters. There is really no doubt about what the arrangement sought to be made was. The substance of it was as I have stated. F That is to say, the price was to be £268, there was to be a rebate of £100 in respect of the old lorry, and (this is perhaps the most important part of it) the transaction was to be carried out by means of hire-purchase finance.

The letters, which begin on Nov. 24, 1937, do not at first G speak of the hire-purchase finance. The letter of that date speaks of the one sum as being £268, and £100 to be allowed "for your [the plaintiffs'] 1935 two-ton Bedford Luton van." Then a specification is sent by the defendants to the plaintiffs of this special Scammell Commer lorry. On Dec. 7, 1937, there is a letter from the defendants in the following H terms:

> Thank you very much indeed for the order which you placed with the writer last evening for one Commer 15-cwt. chassis complete with body.

That refers to a meeting which had taken place on Dec. 6, the day before. As to that, the judge says that they never in any letter gave any assent to that condition, but the defendants assented to the condition as to the balance of the purchase price being had on hire purchase over a period of 2 years. That omission from the letters is not surprising, having regard to the fact that both parties were well aware of that, as a result of the interview of Dec. 6. Then on Dec. 8 the plaintiffs reply as follows:

> We beg to acknowledge receipt of your acceptance of our order. . . . This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years.

That is merely to ratify, to try to put in writing, what had been agreed at the interview on Dec. 6, which, on the judge's finding—and there is no doubt about it—had been the basis of all the negotiations.

After that, on Jan. 27, 1938, the defendants write to the plaintiffs as follows:

> We have now received advice from the United Dominions Trust Co., Ltd., of their acceptance of the hire purchase in connection with the vehicle we are supplying, and we will in due course forward the documents to you.

Those documents apparently were never received by the plaintiffs, either from the United Dominions Trust Co., Ltd., or from the defendants. On Feb. 10, 1938, however, the defendants write as follows:

> Further to our conversation with you on the telephone to-day, we beg to advise you that the new vehicle, which will be taken by you on hire purchase from the hire-purchase company, will be ready for collection in the next few days, subject to mutual acceptance of the hire-purchase agreement, which you advised us you had not yet received from the hire-purchase company. We make it a condition of the supply of vehicles on hire-purchase terms that we approve terms of agreement before supply.

On Feb. 11, an altogether new matter is raised by the defendants. They say that they will inspect the van which was to be taken in part-payment at the figure of £100:

> We advised you that we should only be prepared to take the vehicle at the allowance value of £100 on terms that the vehicle would be subject to our inspection when the new vehicle would be ready for delivery. This is a customary condition applicable to all part-exchange transactions. This is an essential condition.

Then a report was received some time early in February which, in the opinion of the defendants, as appears in their later letters, was unsatisfactory. On Feb. 14, they notified the plaintiffs to this effect. First they make a mistake, as is now admitted, in saying it was a 1934 vehicle, and not a 1935 one, as stated. Then they continue as follows:

> Furthermore the steering is in a dangerous condition, and needs complete overhaul, and certain electrical equipment is missing. Our report discloses that the vehicle generally is in very bad order, and that the steering is so defective as to justify the issue of a prohibition order in respect of the vehicle. We very much regret that under the circumstances this vehicle does not fulfil the conditions contained in our letter of the 24th, and we suggest that you take steps to dispose of it locally. We assume that the hire-purchase company will require a minimum of 25 per cent. deposit, which would call for £67.

On that, the plaintiffs put the matter into the hands of their solicitors, who recite the facts of the agreement and state that Cook, the agent of the defendants, had inspected the vehicle before making the offer, and it was expressly on the basis that they would allow the sum of £100 for it. They say they have suffered loss owing to failure to deliver, and they threaten an action.

It is not necessary to go into the details of this dispute now. It is sufficient to say that, for reasons which appeared to the defendants enough, they did in fact fail to deliver, and, though there was a concluded agreement in the earlier letters, to which I have referred, and in the interviews, they repudiated that agreement. Certain defences which were raised in the action for breach of contract to supply the new van have now been either abandoned or dismissed, and are not taken upon this appeal.

The essential matter which is raised on this appeal is this. It is said that, in the circumstances of this case, there never was any concluded agreement at all between the plaintiffs and the defendants. They say that the matters which passed between them, rightly considered, are no more than negotiations, and that no agreement was ever concluded. They say that the matters which had to be settled between the parties to make a concluded agreement, so that the parties could be *ad idem*, were not in essential matters settled. On this, I think it is right to say that everything must turn upon the actual arrangement made between these particular parties, having regard to the fact that they were business men, dealing with a commercial matter in a usual or very familiar way. For myself, I do not think that the authorities help at all in this matter.

There are two points which almost always arise in this class of case. First of all one has the kind of consideration pointed out by Viscount Dunedin in *May & Butcher* v. *R.* (1), which is cited in *Foley* v. *Classique Coaches, Ltd.* (2). Viscount Dunedin says, at p. 21 :

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. . . Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else.

On the other hand, there are considerations which are set out in such cases as *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (3) in the opinion of Lord Wright, at p. 514 :

> Business men often record the most important agreements in crude and summary fashion : modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.

Then Lord Wright refers to a well-known maxim, and proceeds as follows, at p. 514 :

> That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

Applying those considerations, I think that the substance of these negotiations, which I think resulted in a concluded contract, was this.

The price was fixed. The goods which were to be ultimately supplied were agreed on. The rebate was agreed. The van which was to be taken in consideration of the rebate was agreed, and it was agreed also that the matter was to be concluded upon hire-purchase terms. That was to be the method of financing the transaction. It may be that under the phrase "hire-purchase terms" many different methods of finance might be adopted. It might constitute in certain cases an agreement to make a sale to a third party, such as a finance corporation, who in their turn will hire the goods with an option of purchase to the plaintiffs. Alternatively, it might take the form of a hire purchase from the defendants themselves, though I do not think that that is contemplated in the present case. Again, it might take the form of a direct sale to the party to the hire-purchase agreement, subject to considerations as to payment. All those matters, I agree, are not determined in this contract between the plaintiffs and the defendants. What is certain, however, is this. It is to be done by the method of hire-purchase agreement. I read that to mean that the purchaser must, within a reasonable time, in a reasonable way, satisfying the words "hire-purchase agreement," produce some method whereby he can, under the conditions of a hire-purchase agreement, satisfy his undertaking by one way or another through a hire-purchase agreement to pay the defendants. That seems to me sufficient, and is covered by the kind of case which VISCOUNT DUNEDIN mentions in *May & Butcher* v. *R.* (1), where he says, at p. 21:

> . . . you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else.

I would say here: "You may very well agree that a certain part of the contract, such as the particular conditions on which the hire-purchase agreement was to be made, was to be settled in conjunction with a third party."

I think, giving normal commercial efficacy to this agreement, this does mean that here what is commonly understood by business men to be one of the methods of hire purchase at least shall be the method of discharging the payment to the defendants for this car. To read it otherwise, I think, would be to nullify the intention of the parties, who quite clearly, to my mind, intended such an agreement.

It is perhaps not conclusive, but it is significant, that the reason why the defendants repudiated their obligation was not by any means related to any failure of the hire-purchase transaction, but was on a different ground altogether.

It is said, alternatively, that, if there be here a hire-purchase agreement of this kind to be incorporated into this contract, it must be in the nature of a sale. I think that the judge has rather come to that conclusion, although he has found that the Sale of Goods Act, 1893, s. 4, had no application to this case by reason of the fact—and I think it is true, if the matter does arise for consideration at all—that these letters, looked at as a whole, do constitute a sufficient memorandum of the whole agreement. In my view, however, it is unnecessary to state definitely that this arrangement would necessarily result in a sale. I think the more than likely view is that, as regards the relations between the plaintiffs and the defendants, it would be one of hiring with an option A subsequently to purchase. However, as I say, that question, to my mind, does not arise, because this concluded agreement was not one of sale, but one of a kind, if you please, peculiar to such hire-purchase transactions. Nevertheless, one may now say that it is of a type very familiar to persons undertaking transactions of this kind. It may not B be a contract of sale, but it is a method by which people in this class of business constantly obtain the possession of goods which they desire. I think, therefore, that this agreement was a concluded agreement, that the judge was right in his view, and that this appeal fails.

MACKINNON, L.J.: I agree. Between Nov. 24 and Dec. 8, by C interviews and letters, the plaintiffs and the defendants made a contract. By the terms of that contract, the defendants agreed with the plaintiffs that they would procure a finance company to purchase a lorry from the defendants and hand over its possession to the plaintiffs under the terms of a hire-purchase agreement, pursuant to which the plaintiffs would D ultimately pay to the finance company £268. The defendants further agreed that they would take over from the plaintiffs an old lorry of theirs at a price of £100, and would pay this sum to the finance company, so that it would be deducted from the £268, which the plaintiffs would ultimately pay the finance company under the hire-purchase agreement. E That was a perfectly simple and ordinary business agreement. It is said that it does not constitute a contract enforceable at law, because there was a reference to a hire-purchase agreement, and it is said that no concluded contract would ever have arisen until all the terms of that proposed hire-purchase agreement had been discussed, agreed and F settled between these parties. I cannot accept that suggestion for one moment.

It is significant that the defendants had no difficulty, and were in no doubt at all as to the result of the obligation upon them, because on Jan. 27, 1938, they wrote following on these arrangements:

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> We have now received advice from the United Dominions Trust Co., Ltd. [the finance company], of their acceptance of the hire purchase in connection with the vehicle we are supplying, and we will in due course forward the documents to you.

There is supplied, among the papers before us, the draft of that agreement, which is complete except for the signature, which carried H out the transaction in the way I have indicated. I should have said that the defendants, when they agreed to give the £100 for the plaintiffs' old lorry, had inspected it. Subsequently, the defendants tried to get out of their bargain. When they wanted to get out of this bargain, they said, on a second inspection by a more experienced expert investigator, that they did not think that the old lorry was as good as they had thought it was. They also alleged (as it is admitted now, without justification) that it had been sold as a 1935 lorry, whereas it was really a 1934 one. On those pretexts, the defendants refused to implement their contract. Thereupon the plaintiffs, not unnaturally, sued them for damages.

In answer to that claim, two defences are raised. The first is that there was no contract enforceable at law made between these parties, because it is said that what took place between them amounted only to negotiations for a contract, or an agreement up to a certain point to enter into a contract, the full terms of which were not, according to the exact terms of most hire-purchase agreements, settled and agreed. Secondly, it is said that there is no memorandum within the Sale of Goods Act, 1893, s. 4, and, therefore, the plaintiffs cannot sue upon this alleged contract. I think both those defences fail. I do not desire to go further into the matter which we have been discussing during the argument. Cases like *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (3) and a good many others show that in a business contract one may perfectly well leave as implied many things which would be necessary for discussion and settlement if the parties were the first human beings ever to enter into contracts of this description. As I pointed out during the argument, millions every week pass upon contracts made in the city of London which are made with no more expression of their terms than three letters "c.i.f." In this case, when the parties agreed that they would procure the finance company to sell this particular lorry on hire-purchase terms to the plaintiffs, they knew perfectly well the sort of agreement with the finance company that both parties contemplated. As I have pointed out, the defendants knew that, as they show by their letter of Jan. 27. It is quite true that the form of that agreement might have been in one or other of two or three forms. The essential stipulation implied was that it should be in a reasonable form. Either one of two variant forms, if in a reasonable form, would have sufficed for the satisfaction of the defendants' obligation. In my opinion, therefore, there was a quite complete and enforceable contract concluded between these parties, for the breach of which the defendants are liable.

On the second defence, under the re-enacted provision from the old Statute of Frauds—that statute which has enabled more frauds to be committed than it has ever prevented—there is even less to be said for the defendants than on the first defence, for the simple reason that, in my view, this is not a contract for the sale of goods at all. It is a contract to procure the finance company to purchase from the defendants a car, and to let it on hire-purchase terms to the plaintiffs. Therefore, I think that it is not a contract for the sale of goods, and, therefore, the Sale of Goods Act, 1893, s. 4, does not apply. In the result, I think that the judge was right in his reasoning, and I think the result at which he arrived was right. For these reasons, the appeal, in my opinion, ought to be dismissed with costs.

Goddard, L.J.: I agree. I think that the judge was perfectly right in the conclusion to which he came, and I agree with his reasons. I only desire to say this. Like the judge, I am not satisfied that this was an agreement under which the defendants undertook to procure a finance company to buy from them, because I think that the contract was: "I will put you, the plaintiffs, in possession of a vehicle for a sum of £268, £100 of which is to be satisfied by the delivery of a van, and £168 of which is to be satisfied by instalments over 2 years, being 24 monthly instalments." It seems to me that it is a matter of entire indifference to the plaintiffs whether the defendants procured a finance company to buy direct from them and let to the plaintiffs or whether the defendants procured a finance company to discount bills given under a contract by which the defendants themselves entered into direct relations with the plaintiffs. Those are matters which the defendants could choose for themselves. The plaintiffs, however, would have to take the vehicle, and have to enter into the agreement, provided an agreement was submitted to them which gave them 2 years' credit for the £168. In fact, what happened was that, without submitting any hire-purchase agreement to the plaintiffs, either direct from them to the plaintiffs or by means of a finance company, by assuming the position of hirers, the defendants repudiated the whole transaction on wrong grounds. I think that the reasoning of the judge was perfectly right, that there was a contract, and that the contract was broken. Accordingly, the damages which he awarded must stand. I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Montague Waters* (for the appellants); *George L. Barnett & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

WILKINSON *v.* CHETHAM-STRODE.

[King's Bench Division (Asquith, J.), **October 30, November 1, December 11, 1939.**]

Street and Aerial Traffic—Pedestrian crossing—Light-controlled crossing—Crossing with refuge—Whether refuge part of crossing—Pedestrian stepping from refuge—Contributory negligence—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, *regs.* 2, 3, 4, 5.

The plaintiff was crossing the road at a pedestrian crossing controlled by lights. At the centre of the crossing there was a refuge consisting of three paved sections, one carrying a lamp standard and the other two carrying pylons. The plaintiff had passed along the crossing to the island, and, after taking two or three steps from the island, he was struck and injured by the defendant's car. It was found as a fact that neither party was using reasonable care, and at common law the action would have been dismissed. It was contended that the plaintiff having been injured by a motor vehicle while on a pedestrian crossing was entitled to recover in spite of his contributory negligence:—

Held: the refuge was a separate entity from the crossing and a person stepping abruptly from the refuge was in the same position as a person stepping abruptly from the pavement on to the crossing and could therefore be guilty of contributory negligence. On the facts, the plaintiff's negligence had contributed to the accident and the action would be dismissed.

Chisholm v. *London Passenger Transport Board* (2) *extended.*

[**EDITORIAL NOTE.** The present case is very similar to that of *Chisholm* v. *London Passenger Transport Board* (2). It was there held that a person stepping from A
the pavement on to a light-controlled crossing might be guilty of contributory negligence. It had been previously decided in *Bailey* v. *Geddes* (1) that a person fairly and squarely on the crossing is, in practice, incapable of contributory negligence. The question thus arose whether the refuge was a part of the crossing, so that a person stepping from the refuge was in the same position as one stepping from the pavement, and this question is answered in the affirmative. B

AS TO PEDESTRIAN CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 16, p. 492, para. 724; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 31a, 31b.]

Cases referred to:

(1) *Bailey* v. *Geddes*, [1938] 1 K.B. 156; [1937] 3 All E.R. 671; Digest Supp.; C
107 L.J.K.B. 38; 157 L.T. 364.

(2) *Chisholm* v. *London Passenger Transport Board*, [1939] 1 K.B. 426; [1938] 4 All E.R. 850; Digest Supp.; 108 L.J.K.B. 239; 160 L.T. 79.

ACTION for damages for personal injuries received by the plaintiff by the negligence or breach of statutory duty on the part of the D
defendant. The defendant alleged contributory negligence on the part of the plaintiff. The facts are fully set out in the judgment.

Cyril Salmon for the plaintiff.

R. Armstrong-Jones for the defendant.

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ASQUITH, J.: The statutory duty which the defendant is alleged to have violated is that imposed by the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, dated Jan. 25, 1935, and made by the Minister of Transport under the Road Traffic Act, 1934, s. 18. The accident occurred on July 10, 1938, at 4.30 p.m. at the junction F
of Artillery Row and Victoria Street, Westminster. The plaintiff at the time was walking along the southern pavement of Victoria Street from west to east, making for Horseferry Road. This involved crossing the mouths of a number of streets running into Victoria Street from the south. Of these Artillery Row was one. Opposite the mouth of G
Artillery Row and running into Victoria Street from the north is Buckingham Gate. In the middle of the mouth of Artillery Row is a refuge or island. A common type of island consists of an oval area of pavement with a pylon near each end and an electric lamp standard in the middle. The present island diverged from this common type H
to the extent that, instead of consisting of a continuous paved surface, all of it raised above the level of the carriageway, it consisted of three sections of such paved surface, the middle one carrying the lamp standard, and the other two, to the north and south of it, carrying two pylons. Between the section carrying the lamp standard and each

section carrying a pylon on each side of it there were gaps of unpaved roadway about 4 ft. wide. Hence a pedestrian could cross the mouth of Artillery Row *via* either of these gaps without mounting the raised parts of the island at all, but remaining throughout on the level of the carriageway. A pedestrian so crossing would have on his left a line of metal studs extending from the western pavement to the northern end of the island, and extending thence to the eastern pavement. He would have on his right a metal stop-line extending to the southern end of the island, and thence a line of studs going to the eastern pavement. The mouth of Buckingham Gate is considerably narrower than that of Artillery Row, being about the same breadth as the western half of that street, and lying opposite the western half. The longitudinal axis of the island points, not to the middle of the mouth of Buckingham Gate, but at the pavement east of Buckingham Gate at the point where there are traffic-lights on that pavement. Hence a pedestrian standing on or at the level of the island, in order to see a vehicle in the mouth of Buckingham Gate would have to look, not merely to his left, but somewhat to his left rear; and, if he were standing at the southern end of the island, or in its southernmost gap, and if such a vehicle moved from Buckingham Gate and crossed Victoria Street, the lamp standard and northern pylon would obstruct his view of that vehicle during most of its transit, unless, indeed, on leaving Buckingham Gate the vehicle swung sharply outwards to its left and entered Artillery Row with a wide sweep. I mention these facts with some minuteness because, in my view, they furnish the clue to the accident.

This road junction is controlled by traffic lights. Two of these show east and west along Victoria Street. One of the two is on the northern pavement of Victoria Street and west of the junction, the other on the southern pavement of Victoria Street and east of the junction. The other two lights show north and south along Artillery Row and Buckingham Gate. One is on the western pavement of Artillery Row south of the junction, the other on the eastern pavement of Buckingham Gate north of the junction. These four lights work automatically in conjunction—that is, the lights facing north and south are red when those facing east and west are green, and *vice versa*.

The plaintiff says that, just before he stepped off the pavement to cross Artillery Row from west to east, he saw the traffic-light opposite him was green in his favour. He glanced to right and left, saw no traffic, and walked ahead to the right hand—that is, the southernmost gap in the island—and proceeded straight through the gap without pausing. As he reached the island, he says, he again noticed that the light opposite him was green. He had gone perhaps two or three steps from the island on to the second half of the crossing when he was struck on the outside of the left leg by the defendant's car. He received a violent blow on the left shoulder, was spun round to his right, and fell with his forehead against one of the raised pylons on the island, fracturing his skull and sustaining other injuries.

The defendant says that, with a friend sitting beside her on her left, she was driving her car southwards down Buckingham Gate. At the stop-line near the mouth of Buckingham Gate, she was halted by the traffic-light level with that stop-line and on her left, since the light was red, and so against her. When this light changed to amber and while it was still showing amber, she changed gear and moved forward across Victoria Street towards Artillery Row, when the light turned green. It was not until she was halfway across Victoria Street that she first saw the plaintiff standing on the refuge, or in one of the gaps in it, and looking, as it seemed, towards his left, and, as she thought, towards her car. He did not move, so, assuming that he was waiting for her to pass, she moved on. She had to pass rather close to the refuge, because, on her left and a little beyond it, there was a car drawn up stationary at the side of the road. As she passed the refuge, she felt a bump as of an impact on the side of her car behind the level of her head.

The passenger in the defendant's car, Miss Richards, in substance confirms the defendant's account of the accident. In addition, however, Miss Richards saw what the defendant did not. She saw the plaintiff start to cross the mouth of Artillery Row before the lights turned to green for the defendant, and, therefore, while the plaintiff's lights were green in his favour. She confirms the plaintiff's story to the extent that he had started to cross when the lights were in his favour.

Although I think that all the witnesses were doing their best to tell the truth, I cannot accept without qualification the account given by any of them. If the plaintiff is right in saying that he still had a green light in his favour when he reached the island, the defendant must have crossed most of Victoria Street with a red light against her. I am satisfied that she did not do this. I am also satisfied that, unnoticed by the plaintiff, the light facing him had changed to red when he had advanced only a few steps from the pavement towards the island, and before he had reached the island itself. I think it probable that he paused in the southern gap in the island and then moved forward into the path of the car.

The accident, in my view, was due to the failure of both parties to allow for the imperfect alignment of Buckingham Gate with Artillery Row. The effect of the configuration of these two streets, together with the greater breadth of Artillery Row, was, in the circumstances, to screen each from the other a car crossing from Buckingham Gate and a pedestrian standing at or near the southern end of the island, unless, as I have said, the car swung well out to its left immediately on emerging from Buckingham Gate. The defendant said, in reply to a question of mine, that the car did not make a wide sweep of this kind. Therefore, the defendant would tend not to see the plaintiff, nor to be seen by him, till she was very close indeed. Though the defendant was travelling at a modest speed, I think that she emerged suddenly from behind the northern section of the island just as the plaintiff, having previously looked to his left, but not far enough to his left, also suddenly emerged from the southern end of the island and stepped from its shelter on to the crossing right in front of her wheels. I think that the defendant was mistaken in thinking that the plaintiff was looking at the car as it approached. A If he had been looking at it, he would have seen it and avoided it. Nor do I think that, on a careful inspection, he would have appeared to have been looking at it. I do not find that the plaintiff allowed the bonnet and the front part of the car to pass him and then walked into the side of the car, as was suggested on behalf of the defendant.

B Accordingly, I find that neither party was using reasonable care, if one has regard to the peculiarities and dangers of this particular crossing, which reasonably vigilant persons would have appreciated and for which they would have made provision. I also find that the negligent conduct of the plaintiff and that of the defendant were sub- C stantially simultaneous, thus leaving no room for the operation of the rule of last opportunity. Therefore, if the liability of the parties falls to be determined exclusively by the common law—that is to say, if there were here no question of a pedestrian crossing and the peculiar statutory incidence attached to a pedestrian crossing—then the action D fails. The plaintiff can succeed only if the operation of the regulations referred to relieves him of liability for contributory negligence.

The second question, therefore, is whether or not the pedestrian crossing at the mouth of Artillery Row, or any part of it, is a pedestrian crossing governed by the Pedestrian Crossing Places (Traffic) Provisional E Regulations, 1935, which I will call the 1935 regulations. The material 1935 regulations are regs. 2, 3, 4 and 5. Reg. 2 defines a crossing as follows:

> "Crossing" for the purpose of the regulations means a crossing-place for foot passengers indicated by a traffic sign prescribed for the purpose of regulations F made by the Minister.

Reg. 3 provides as follows:

> The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

Reg. 4 provides as follows:

> G The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light-signals shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot-passenger shall have precedence over all vehicular traffic at such crossing.

Finally, reg. 5 provides as follows:

> H The driver of every vehicle at or approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable or by light-signals shall allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing.

The first question, therefore, is whether or not this crossing is a crossing-place for foot passengers indicated by a traffic sign prescribed for the purpose of regulations made by the Minister. The material regulations dealing with traffic signs are the Traffic Signs (Pedestrian Crossings) No. 2 Provisional Regulations, 1934, dated Nov. 7, 1934, which I shall call the 1934 regulations. I need not recite these regulations beyond stating that the relevant ones are regs. 2, 2 (*a*), 3 (1), (2) and 4.

On behalf of the defendant, it was first contended that the mouth of Artillery Row is not a pedestrian crossing within the meaning of the 1935 regulations, and that those regulations do not apply to it because it was not indicated by the traffic signs prescribed by the 1934 regulations. It was argued that, although it was indicated by studs, as provided in the 1934 regulations, the studs were not in all cases separated by the intervals specified in reg. 3 (2) of the 1934 regulations. Some colour was lent to this suggestion by the plan, which, if it was accurate, showed the studs to be wrongly spaced. At best, the point is a very technical one, but counsel and myself both viewed the crossing and found that in fact the studs complied with the regulation. The point that this was not a pedestrian crossing was, therefore, rightly abandoned by counsel for the defendant.

If, then, the 1935 regulations apply, which of them apply directly to this case ? Reg. 4 applies only to crossings where traffic is not controlled by a police constable or by light-signals. Reg. 5 applies only to crossings which are so controlled. Having regard to the arrangement of the light-signals described above, I hold that this is a controlled crossing, and that, as between regs. 4 and 5, reg. 5 is the relevant regulation. Reg. 3 would appear to apply both to controlled and to uncontrolled crossings, but reg. 5 seems more directly in point in this case.

If we assume that my findings of fact are right, and that the regulation which applies directly is reg. 5, and if the whole transit from pavement to pavement, including the island and its gaps, is a single pedestrian crossing, then, in the absence of other considerations, the plaintiff must succeed, for, on my findings, he had started to go over the crossing before the defendant received a signal that she might proceed over it, and she failed to give him free and uninterrupted passage. On the authorities, this duty would appear to be an absolute duty, and not to be excused by any contributory negligence on the part of a pedestrian.

At first sight, this might seem to conclude the case in favour of the plaintiff. If the crossing was a pedestrian crossing and a pedestrian was fairly and squarely on it when he was run down, then, by the decision of the Court of Appeal in *Bailey* v. *Geddes* (1), the plaintiff would seem to be incapable of contributory negligence. It is true that in *Bailey* v. *Geddes* (1) the crossing was an uncontrolled crossing governed by regs. 3 and 4, and not, as here, a controlled crossing governed by regs. 3 and 5, but there seems to me no ground for distinguishing between the application of regs. 4 and 5 *quoad* the immunity of the plaintiff from liability for contributory negligence.

In order to distinguish this case from *Bailey* v. *Geddes* (1), counsel for the defendant here argued (i) that the transit from side to side of Artillery Row consisted, not of a single pedestrian crossing, but of two crossings, one from the west pavement of Artillery Row to the island, and the other from the island to the east pavement of Artillery Row, and (ii) that, if this were so, then, in stepping from the island on to the second crossing, the plaintiff was not a person "on a crossing" within reg. 3, nor a person who had "started to go over the crossing" within reg. 5. On the contrary, it was submitted, he was a person stepping on to a crossing in the same sense and to the same extent as the plaintiff in *Chisholm* v. *London Passenger Transport Board.* In that case, the Court of Appeal held that, while a person fairly and squarely on a crossing was incapable of contributory negligence, a person stepping on to a crossing suddenly from a pavement under the wheels of approaching traffic was capable of contributory negligence, and was guilty of it. Finding, therefore, that that was what had happened on the facts of the case before them, they gave judgment for the defendants.

In support of the contention that the so-called pedestrian crossing was in reality two distinct crossings, it was submitted on behalf of the defendant that the western half of the crossing was controlled and the eastern half uncontrolled, as was held in *Chisholm's* case (2) of the north and south halves of the crossing at the mouth of Fleet Street. As to this contention, I do not think that the two halves of this crossing were, as to one, controlled, and, as to the other, uncontrolled. The foundation of the court's decision in *Chisholm* v. *London Passenger Transport Board* (2) that the Fleet Street crossing was of this character was that no light from Fleet Street showed east towards Ludgate Circus. The light on the northern pavement of Fleet Street was blind to westbound traffic moving into Fleet Street. To such traffic no light from Fleet Street was visible at all. In this case, the corresponding light is that on the west pavement of Artillery Row, and this was not a blind light, but showed both ways. The only object of its showing northwards—that is, towards the defendant's car—must have been to control the movements of a car coming across Victoria Street into Artillery Row, but, even if it were otherwise, and if one half of the crossing were controlled and the other half uncontrolled, nothing in the language of the Court of Appeal in *Chisholm's* case (2) supports the suggestion that, because half is controlled and half uncontrolled, there were two separate crossings. Indeed, passage after passage from the judgment of SCOTT, L.J., might be cited to negative that suggestion. Therefore, I hold that the whole transit across the mouth of Artillery Row was a single pedestrian crossing.

Again, however, this does not dispose of the matter. It is manifest that, if a pedestrian on an island at a pedestrian crossing were free to step under the wheels of traffic approaching the island at a moderate pace, and free then to hold such traffic liable without being open to the answer of contributory negligence, then much the same inconveniences and absurdities would result as those which were stressed by the Court of Appeal in *Chisholm* v. *London Passenger Transport Board* (2). Unless the language of the material regulation is so plain that this result is inevitable, I should try to construe that language in a sense which avoids it. When reg. 5 provides that, in certain circumstances, a pedestrian who has started to go over a crossing is to have free and uninterrupted passage, it seems to me reasonable to construe its language as subject to the implied limitation that this right is to be enjoyed by the pedestrian only so long as he is on the crossing itself, and I think he ceases to be on the crossing when he reaches an island and steps on to it, or, as in this case, into a space enclosed by its contours and within its protection.

Counsel were unable to cite to me any case which directly decides whether or not an island in the middle of a crossing is part of that crossing. I have been informed that there is an unreported case in which a person was convicted of lingering on a pedestrian crossing when he was in fact pausing on an island, but the conviction was quashed on appeal, on the ground that, for the purpose then in hand, an island was not part of the crossing. There is also a diagram annexed to certain Pedestrian Crossings Traffic Signs Regulations, 1934, dated June 7, 1934, designated in the margin "Pedestrian crossing in conjunction with refuge" and another diagram designated "Pedestrian crossing without refuge," which, so far as they go—and at best they carry one a very short way—may be taken to imply a distinction between the crossing itself and a refuge as something superimposed on it. I hold that, for the present purpose, the refuge is a separate entity from the crossing, there being nothing in principle and no authority which binds me to hold otherwise, while what authority there can be said to be points to that conclusion.

If this be so, a person who steps off an island is stepping from something which is not part of the crossing on to something which is, and, by analogy with *Chisholm* v. *London Passenger Transport Board* (2), he is capable of contributory negligence if he steps on to it abruptly and when traffic travelling at a reasonable speed cannot stop in time to avoid hitting him. I find that this is what the plaintiff did in the present case. At common law, he is guilty of contributory negligence, and his claim must fail unless he can pray in aid the immunities conferred by reg. 5 or reg. 3. For the reasons I have given, I do not think that he can evoke them successfully. There must, therefore, be judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors: *Pothecary & Barratt* (for the plaintiff); *Stanley & Co.* (for the defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

TEMPERANCE PERMANENT BENEFIT BUILDING SOCIETY *v.* ISLES.

[COURT OF APPEAL (MacKinnon, Clauson and Goddard, L.JJ.), **December 21, 1939.**]

Mortgage—Remedies of mortgagee—Enforcement of security—Claim for possession—Originating summons—Substituted service—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*) (ii), (iv).

Practice—Originating summons—Substituted service—Copy of notice placed on door of premises—Newspaper advertisement—R.S.C., Ord. 67, *r.* 6.

A mortgagee desired to obtain possession of, and to proceed to a sale of, the mortgaged premises and to issue an originating summons for leave to do so in pursuance of the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii). The whereabouts of the mortgagor were unknown, and the question arose whether the court could order substituted service of the notice of the summons on the mortgagor and, if so, what form the substituted service should take:—

HELD: there was jurisdiction under R.S.C., Ord. 67, r. 6, to order substituted service, and such substituted service should be effected by placing a notice of the summons on the door of the mortgaged premises and by advertisement in one newspaper.

[**EDITORIAL NOTE.** CROSSMAN, J., was of opinion that there was no jurisdiction to order substituted service in this case, and that the court could have such power only if the rule was amended as was done in the last war. The Court of Appeal have taken the opposite view, and there is, therefore, jurisdiction to order substituted service in such a case.

AS TO SUBSTITUTED SERVICE OF ORIGINATING SUMMONS, see HALSBURY, Hailsham Edn., Vol. 26, p. 108, para. 211; and FOR CASES, see DIGEST, Practice, pp. 964, 965, Nos. 5019-5026. See YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 1581.]

APPEAL from a decision of CROSSMAN, J., given on Dec. 13, 1939, holding that, in the circumstances of the present case, he could make no order for service other than for personal service. The case being a meritorious one he ordered the costs of the application to be added to the security.

M. Gravenor Hewins for the appellants.

Hewins: This application relates to the service of an originating summons issued under the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii), (iv). The mortgagees are seeking to recover possession of and sell the property, the present whereabouts of the mortgagor being unknown. The mortgagor has vacated the premises and has handed the keys to the mortgagees. The application raises the question as to whether, in the circumstances, the court has power to dispense with service of the originating summons on the mortgagor, or may direct substituted service, such as by posting up a copy of the summons on the door of the premises. The present application is in the nature of a test application, and there are many similar cases pending. This application has been made at the suggestion of one of the masters, in order that a ruling of the court may be obtained. The application is made to this court under R.S.C., Ord. 58, r. 10, consequent upon the refusal of a similar application by CROSSMAN, J. The application was for an order dispensing with service and ordering that service by posting a copy of the summons on the premises should be deemed sufficient service under R.S.C., Ord. 67, r. 6. CROSSMAN, J., said that there was no rule authorising the dispensing with service, and that substituted service, in the strict sense, would mean complying with the rule. Also, to obtain an order A for substituted service, it was necessary to satisfy the court that service in the way suggested might reasonably be expected to bring the notice to the knowledge of the mortgagor.

MACKINNON, L.J.: We cannot dispense with notice. R.S.C., B Ord. 67, r. 6, provides for the substitution of notice for service by letter or otherwise. There must be a public advertisement, and a copy of the notice must be placed on the door of the house. There will be 8 days allowed for appearance, and leave to add the costs of this application to the security. C

CLAUSON and GODDARD, L.JJ. agreed.

Order for notice by advertisement in a London morning paper and by the posting up of a copy of the summons on the door of the premises.

Solicitors: *Shaen, Roscoe, Massey & Co.* (for the appellants). D

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL (AT THE RELATION OF STEVENS) *v.* WIMBLEDON CORPORATION. E

[CHANCERY DIVISION (Simonds, J.), **November 16, 17, 20, 21, 22, 23, December 13, 1939.]**

Electricity Supply—Charges for supply—Agreement for supply on two-part tariff system—Method of assessing fixed annual charge—Validity of F *agreement made under Electric Lighting (Clauses) Act,* 1899, *Sched. s.* 33 *—Incorporating two-part tariff—Electric Lighting Act,* 1882 (c. 56), *ss.* 19, 20*—Electric Lighting (Clauses) Act,* 1899 (c. 19) *Sched. s.* 33*— Electricity (Supply) Act,* 1926 (c. 51), *s.* 42.

The defendants were the authorised undertakers for the supply of electricity to consumers in their area. The relator was a resident G in that area and was supplied with electricity under a two-part tariff on the terms, *inter alia*, that he should pay a fixed annual charge and also a charge per unit for all electricity actually consumed by him. The fixed charge was assessed by the defendants' chief engineer and manager "mainly in accordance with the size and type of house" supplied, and his "decision as to the amount of the fixed charge" was to be final and conclusive. It was also to be "assessed . . . by the H corporation based on the size and nature of the electrical demand of the house and their decision as to the fixed charge is final and conclusive." The fixed charge in the case of the relator's house was assessed at £15, and it was proved that similar houses in the same neighbourhood had been assessed at £7 0*s.* 6*d.* These terms were incorporated in an agreement between the relator and the defendants, the latter contending that they had power to enter into such agreement under the

Electric Lighting (Clauses) Act, 1899, Sched. s. 33. It was contended by the plaintiffs that the contract was *ultra vires* on the grounds that (*a*) the Electric Lighting (Clauses) Act, 1899, Sched. s. 33 was intended to meet only exceptional cases, (*b*) agreements on the two-part system are provided for under the Electricity (Supply) Act, 1926, s. 42, which impliedly excludes the power to make such agreements under the schedule to the 1899 Act, (*c*) the terms of the contract constituted A an undue preference of other consumers :—

HELD : (i) the defendants' two-part tariff system was not illegal *per se* as they were entitled to act under the power given to them by the Electric Lighting (Clauses) Act, 1899, Sched. s. 33, and neither the provisions of the Electricity (Supply) Act, 1926, nor those of the Electric Lighting Act, 1882, rendered it in itself *ultra vires*, although it was found as a fact that the assessment of the fixed annual charge was B arbitrary and capricious.

(ii) on the facts of this particular case, the plaintiff relator was entitled to an injunction in the words of the Electric Lighting Act, 1882, ss. 19 and 20.

(iii) the relator was not entitled to be informed of the basis and method of assessment of the fixed charge.

C **[EDITORIAL NOTE.** It has become a common practice for householders to be supplied with electric energy upon the two-part tariff here considered. This tariff may be incorporated in an agreement made under the 1899 Act, but it is held that the assessment of the fixed charge must be reasonably uniform in the cases of houses of the same type and taking a similar supply of current.

AS TO CHARGES FOR ELECTRIC SUPPLY, see HALSBURY, Hailsham Edn., Vol. 12, D pp. 582-584, para. 1123; and FOR CASES, see DIGEST, Vol. 20, pp. 207, 208, Nos. 47-56.]

Cases referred to :

(1) *A.-G.* v. *Long Eaton Urban Council,* [1914] 2 Ch. 251; *on appeal* [1915] 1 Ch. 124; 20 Digest 207, *48*; 84 L.J.Ch. 131; 111 L.T. 514.

E (2) *A.-G.* v. *Hackney Corpn.,* [1918] 1 Ch. 372; 20 Digest 207, *50*; 87 L.J.Ch. 122; 118 L.T. 393.

ACTION by the Attorney-General at the relation of Major C. H. Stevens for a declaration that the defendants' two-part tariff agreement for the supply of electricity to consumers was invalid and *ultra vires*, for an F injunction to restrain them from supplying electricity on the terms thereof, and for a declaration that all consumers in the area supplied by the defendants were entitled to be supplied with electricity under a two-part tariff on uniform terms.

C. E. Harman, K.C., *J. Leonard Stone* and *F. B. Alcock* for the plaintiffs.

G *Sir Lynden Macassey, K.C.*, and *Maurice FitzGerald, K.C.*, for the defendants.

SIMONDS, J.: This is an action by the Attorney-General on the relation of one Charles Henry Stevens, who is the owner and occupier H of a private dwelling-house, No. 204, Worple Road, Wimbledon. The defendant corporation are, under the conjoint effect of numerous provisional orders, which were duly confirmed by Acts of Parliament, authorised, subject to these orders and to the provisions of the Electricity Supply Acts, 1882 to 1936, to supply electrical energy within an area of supply embracing Wimbledon, Merton and the Maldens and Coombe.

The relator's house is in that area, and, on his relation, the Attorney-General in this action challenges the validity of the charges which the defendants make for the electricity supplied by them under the form of two-part tariff which they have adopted. The relator himself joins as co-plaintiff, claiming in his own right the relief to which I shall later refer.

Nothing here turns on the provisions of the Wimbledon provisional orders. The defendants' powers of charging for a supply of electrical energy are governed by the Electricity Supply Acts. In other words, they may charge (i) according to the actual amount of energy supplied, or (ii) according to the electrical quantity contained in the supply, or (iii) by such other method as may for the time being be approved by the proper authority (now the Minister of Transport). However, in addition to those statutory methods of charge, it is open to a local authority as undertaker to avail itself of the Electric Lighting (Clauses) Act, 1899, Sched. s. 33. Since this is the section by virtue of which the defendant corporation have purported to charge the relator, I will set it out:

> Subject to the provisions of the special order and of the principal Act, and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned, the undertakers may make any agreement with a consumer as to the price to be charged for energy, and the mode in which those charges are to be ascertained, and may charge accordingly.

The defendant corporation took advantage of this section to introduce in 1933 a form of two-part tariff which, as it was hoped, would benefit a large number of consumers of electricity within the area of supply, and would result in a greatly increased consumption. They did not, as perhaps they might have done, obtain, or try to obtain, the authority of the Minister under the Electricity (Supply) Act, 1926, s. 42, but preferred to introduce the tariff by agreement with each consumer, leaving untouched the right of the consumer to be supplied at such flat rate as the private Acts or orders authorised.

The terms and conditions of the two-part tariff so introduced are conveniently set out in their original and later form in the particulars of defence. In their original form, they were described as follows:

> Terms and conditions of the two-part tariff for the supply of electricity for domestic purposes in a private dwelling-house, bungalow or flat. Consumers of electrical energy in premises occupied solely as private residences may at their option and as an alternative to the existing rates, be charged for the supply for all purposes under a two-part tariff. . . . (A) An annual fixed charge based on the size and type of premises occupied, with the addition of: (B) A charge of ½*d.* per unit for all electricity consumed during the two winter quarters and ⅓*d.* unit for all electricity consumed during the two summer quarters. . . .

There was also the further term that the fixed charge should be payable by equal quarterly instalments, and should be assessed by the chief engineer and manager mainly in accordance with the size and type of house, and his decision as to the fixed charge should be final and conclusive. Further terms were that the supply should be given on the basis of an annual contract and that the corporation reserved the right to revise and alter the terms and conditions of supply from time to time, if found necessary, on giving not less than one month's notice by advertisement or otherwise.

In Apr., 1934, these terms and conditions were materially changed. I need only notice that the fixed charge was to be :

> A . . . assessed and notified by the corporation based on the size and nature of electrical demand of house and their decision as to the fixed charge is final and conclusive. . . .

The price per unit is not stated, and a month's notice was no longer required for the exercise of the reserved right of revision and alteration. These were the terms upon which the relator and many other consumers B agreed to take a supply of electricity from the defendant corporation. The relator, who had for many years been a consumer both for lighting and for power purposes, and had paid for the units consumed by him at the appropriate rates, was attracted by the possibility of saving on the two-part tariff, and inquired of the corporation what would be the fixed C charge for his premises, No. 204, Worple Road. On Nov. 22, 1933, he was informed that the annual fixed charge would be £16, and that the additional charge would be only ½*d.* per unit during the two winter quarters and ⅓*d.* per unit during the two summer quarters, whether for lighting or for power purposes. He was further told that, upon the D basis of his consumption during the four quarters ending Sept., 1933, he would, by coming on the new tariff, save £22 8*s.* 4*d.* Accordingly, on Nov. 24, he made formal application to the defendant corporation to be charged for the supply of electrical energy in accordance with the terms and conditions of the two-part tariff, and agreed to pay as the annual E fixed charge a sum of £16 in four quarterly instalments as required. His application was accepted, and he was thereafter charged on the new basis. It is irrelevant to this part of the case that in 1934 the defendant corporation, in exercise of the right that I have mentioned, purported to alter in certain respects the terms of supply.

F Upon these bare facts, the first question arises. It is claimed that the defendants' two-part tariff is *ultra vires*, and the claim is supported by a number of contentions with which I must shortly deal. First, it is said that the defendants are making a misuse of the Electric Lighting (Clauses) Act, 1899, Sched. s. 33. That section, it is said, being intended to meet G only the exceptional case where a special agreement is made necessary by special circumstances, the defendants are using it to offer a tariff to all and sundry who care to take it. I see no force in this contention. If an undertaker can make an agreement with one consumer, he may make it with ten, a hundred, or a thousand consumers. He may be laying up H for himself a store of difficulties, but that does not arise at this stage.

Secondly, it is said that it is not permissible to make an agreement under sect. 33 which takes the form of a two-part tariff. That, it is said, is a special form of charge, for which provision is made by sect. 42 of the Act of 1926, and it is not to be supposed that the legislature intended on the one hand to authorise, subject to special safeguards, that particular method of charge, and, on the other hand, to permit it as an agreed method of charge under sect. 33 of the earlier Act. This, I think, is a mistaken contention. It is one thing to allow the undertaker and the consumer to come to an agreement and another and very different thing to permit the undertaker to impose upon the consumer a particular form of charge. It is with the latter only that the Act of A 1926 was concerned. The defendant corporation was, in my judgment, entitled to enter into an agreement for a two-part tariff with the relator and with other consumers.

Next, a contention is raised which makes it necessary to refer to other provisions of the Electricity Acts, though they are more directly relevant B to other questions raised in the action. The Electric Lighting Act, 1882, s. 19, provides as follows:

> Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which C any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply.

Sect. 20 of the same Act provides as follows:

> The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be D agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity.

I will later consider those sections in relation to the particular facts of this case upon which the relator relies for his claim that their provisions have in fact been infringed. At this stage, their relevance, as I E understand it, is that the relator says that, given such terms and conditions as constitute the agreement here under consideration, it follows that there must be a breach of the statutory provisions. A system, it is said, is inherently vicious under which a fixed charge is based on "the size and type" of premises, or "the size and nature of electrical demand," F with a proviso that the decision of the chief engineer or of the corporation is to be final and conclusive, and with the reservation of a right to the corporation to revise and alter at will the terms and conditions of supply. I so far concur in this contention as to agree that such a system is a thoroughly bad one. A method of charging which is not based on any G precise and ascertainable formula, but proceeds from the vagueness of "type" and "nature of electrical demand" to the final and unchallengeable decision of an official of the local authority is open to grave abuse. The committee appointed by the Electricity Commissioners to report upon the uniformity of electricity charges and tariffs in their H 1930 report were unanimous in expressing their strong disapproval of any basis of charge which requires adjustments by members of the staff of the undertaking which are not made public. The method adopted by the defendant corporation is peculiarly open to this criticism. It will appear, when I come to examine the evidence, that in practice the method became what in theory it might be expected to become—namely, arbitrary and capricious in its incidence, and, if capable of explanation, at any rate unexplained by the defendants' officers. Nevertheless, however strongly such a method may be condemned, it does not follow that it is *ultra vires*, and I am unable to conclude that such a method, A irrespective of its consequences, is *per se* illegal and invalid. I cannot, therefore, make a declaration on the broad lines claimed by the plaintiff, but must turn to the other part of the case, which raises the question whether or not, assuming that the system is not *per se* an illegal one, it has been operated as between the relator and other consumers in B such a way as to infringe sects. 19 and 20 of the 1882 Act.

In considering this question, I must bear in mind the principles laid down by SARGANT, J., and the Court of Appeal in *A.-G.* v. *Long Eaton Urban Council* (1) and by the Court of Appeal in *A.-G.* v. *Hackney Corpn.* (2), and, further, the particular conditions under which the C defendants purchase their supply from the joint electricity authority and sell it to their own consumers. Circumstances which render it less costly or otherwise more profitable to supply customers other than the relator constitute a legitimate reason for giving better terms to them than to him, and the court will not attempt to measure what is probably D incapable of measurement—namely, the degree in which, as between one consumer and another, the supply is costly or profitable to the undertaker. Nor is it to be doubted that the undertaker may charge a consumer less in order to induce him to take another supply where taking that other supply will lower the cost to the undertaking of the existing E supply: *per* SCRUTTON, L.J., in *A.-G.* v. *Hackney Corpn.* (2), at pp. 397, 398.

Again, it must be borne in mind that the supply of electricity is attended by peculiar difficulties. The obligation to meet a maximum demand which only occurs for a short time in the year involves the F undertaker in an expenditure upon plant and equipment which the output for the rest of the year does not justify. Any consumer who increases the total maximum demand upon the undertaker is thus unprofitable as compared with a consumer whose demand does not add to the burden.

G It is beyond the wit of man to devise a system of charge under which each consumer is charged in exact proportion to the cost of supplying him, and it is questionable whether, if it could be devised, it would be in all respects satisfactory. It remains, however, a fact distinguishing the supply of electricity from that of water or gas that it cannot be H provided from a reservoir, so that the cost of supply to different consumers may vary, not merely by reason of different circumstances of distribution, but also by reason of the month or week or hour of the day in which their demands have to be fulfilled. In the present case, the undertakers do not generate their own electricity, but they are faced in effect with the same problem, as they in turn have to meet charges from their suppliers into which the element of maximum demand largely enters.

I therefore approach the questions which are raised by sects. 19 and 20 of the Act of 1882 with the full consciousness that inequalities are inevitable, and that such words as "same terms," "similar circumstances," "corresponding supply" and "undue preference" must be construed and given effect to with the latitude which the subject-matter demands.

I have already stated the terms on which the relator became a consumer on the two-part tariff at a fixed charge of £16 per annum. On Aug. 16, 1934, he was notified that as from July 1, 1934, his annual fixed charge would be reduced to £15, the charges per unit for electricity consumed remaining unaltered. On Sept. 13, 1934, he repeated a question which had been asked before and gone unanswered—namely, how the fixed charge was arrived at—alleging that others in higher-rented houses were being charged considerably less. From that time until the hearing of this action, he tried repeatedly to get a clear answer, but did not get one. It was not, indeed, until the chief engineer for the defendant corporation went into the witness-box in the course of this action that one at least of the most material factors in determining the fixed charge was divulged. I do not propose to go through all the wearisome correspondence between the relator and the chief engineer, and, later, between the relator's solicitors and the town clerk. The impression which is left upon my mind on a re-reading of it is that a little more candour in its initial stages on the part of the chief engineer might well have averted these proceedings. In his reply to the letter of Sept. 13, he declines to give any further information beyond that contained in the pamphlet issued to all consumers, which amounted only to the statement that the fixed charge was based, not only upon the size of the premises, but also upon the nature of the demand for electricity at such premises, and further committed himself to the statement that in none of the premises which the relator was comparing with his own was the demand in any way similar. This was the tone adopted throughout. Further information and explanation were from time to time extracted by the pertinacity of the relator, but, if he regarded the further information as inconsistent with itself, and the explanation as obscure, he is not, in my judgment, to be blamed for that, for in fact all the time the chief engineer was concealing from him the arbitrary adjustments which he thought it desirable to make. It is in truth a difficult task at the same time to give a satisfactory explanation and to conceal the fact which alone explains what is done.

Eventually, the relator, who knew well that a much lower fixed charge was assessed on houses which appeared to be in all respects comparable with his, asked and obtained an answer to the following question:

> Will you tell me the maximum demand that I can make upon your supply so

> that the standing charge on this house may be reduced to that of other houses of similar size ?

The answer, given on Nov. 26, 1936, was as follows :

> 2½ kilowatts at times of our peak load.

Upon this, he naturally asked on Dec. 1 what the times of the peak load were, adding that, when he knew, he would see that that restriction was observed. To this, on Dec. 3, 1936, the chief engineer replied that the relator would realise that, through inadvertence, it was possible that his demand might not be so restricted, and that the corporation in consequence might lose heavily on his supply. It would therefore be necessary to instal a time-switch and circuit-breaker to ensure automatically that during November and December the demand at his premises should be restricted to 2½ kilowatts between the hours of 8 a.m. and 9 a.m. and the hours of 5 p.m. and 7 p.m. daily. He pointed out the inconvenience of such a restriction, and added that, if the relator wished to proceed further in the matter, he would ascertain what the necessary apparatus would cost, and would inform him what the rental for it would be. I pause to point out that 2½ kilowatts is a very small amount, and that the restriction would not, for instance, permit simultaneous consumption by two ordinary electric fires. Not unnaturally, the relator replied that he was willing to instal any gadgets and to check his supply in the same way as the supply of anyone else was checked, and willing to pay the cost which it was usual to charge the residents in a similar sized house in similar circumstances. On Dec. 8, the chief engineer replied as follows :

> By your letter of the 1st instant you agreed to restrict the demand at your premises to 2½ kilowatts between the hours of 8 a.m. to 9 a.m. and 5 p.m. to 7 p.m. throughout the months of November and December in each year, and therefore on that condition and as from the date of the above letter the fixed charge on your premises has been reduced to £7 0*s.* 6*d.* per annum, which is the fixed charge applicable to any other house in the borough of similar size to your own with a normal demand. In the first part of your letter under acknowledgement you give me permission to instal any gadgets that I may wish to check your supply. I accept this offer with thanks and propose to do this and will give you 48 hours' notice.

This letter at least disclosed that £7 0*s.* 6*d.* would be the fixed charge for the relator's house if his demand were " normal," though that term is still undefined.

On Dec. 11, the relator replied that he took it that the chief engineer's letter meant that all houses of this size were likewise restricted during the same hours of the same months, and, as that was the only condition, he was put on the same footing as to fixed charge. To this the chief engineer replied on Dec. 12 as follows :

> There is no other house in our area of supply of similar size to your own where the same maximum demand may arise as at your premises, but I can assure you that if a similar case does arise the same limitation will be imposed unless the consumer is willing to pay the increased fixed charge that we have asked from you and which you have refused.

If this letter is intended to mean that no house of similar size had an exactly same maximum demand, it may be correct. It appears to me, however, to be a letter which it is difficult to justify, for it is obvious that such a restriction, if imposed at all, ought to be imposed, not only where the maximum demand was the same as that of the relator, but also whereever it was such that there was a reasonable possibility of a load of 2½ kilowatts being exceeded during the peak hours. At any rate, it was not satisfactory to the relator, and, after further interminable correspondence, in the course of which, on Feb. 23, 1937, the chief engineer once again refused to explain in detail how he arrived at the fixed charge, this action was brought.

In the course of the action, discovery was had and certain interrogatories delivered, but, even so, the relator must have come into court without knowing, and without his advisers knowing, why his fixed charge should be £15 if a house of the same size with a so-called normal demand was charged £7 0*s*. 6*d*. He knew that the fixed charge was determined by the size and the nature of the electrical demand. He knew, or could assume, that the size of the house was a factor capable of certain assessment. Upon the other factor—namely, the nature of his demand for electricity—he could obtain no satisfactory information. It is indeed a striking fact that he was not told that the essential feature of the fixed charge system was that the assessment was based on floor space—that is to say, size only—unless it appeared that the consumer, upon a basis of past consumption, would save more than 25 per cent. of his electricity cost by going on the two-part tariff. It was only when the chief engineer was in the witness-box that this fact came out. It did not matter whether the consumer's load factor was good or bad from the point of view of the undertaker. If he saved less than 25 per cent. his case was not brought before the chief engineer for special assessment. If he saved more than 25 per cent. then he was specially assessed in a sum which might be twice or thrice the fixed charge based on floor area, or any other sum which the chief engineer thought fit to select. This at least was the system, and it is to be observed that the very factor which the chief engineer had repeatedly told the relator was wholly irrelevant—namely, the number of units consumed—was in fact the first vital element, for the question of special assessment never arose unless so many units were consumed that a certain saving was effected by the two-part tariff.

Having at length ascertained the first step in the system of special assessment, one may pause to examine its bearing on the present case. Let me assume the validity of such an arbitrary distinction between consumers who do and consumers who do not, upon the basis of past consumption, save 25 per cent. of their cost, irrespective of what their load factor may be. How is this system worked in practice ? It is not surprising to find that its operation is haphazard and capricious. If, for reasons which appear to the defendant corporation as adequate, a saving of 25 per cent. is made a ground for distinction between one consumer and another, it is surely not too much to expect that such a distinction should be observed with reasonable care. I do not lay stress on the fact that the chief engineer, when challenged with cases where no special assessment was made though the saving was slightly in excess of 25 per cent., justified his action or inaction by saying that he did not work meticulously to that percentage, though that reservation is, from an administrative point of view, dangerous and undesirable. I do, however, emphasise this fact, which A goes, in my judgment, to the root of the matter. If the defendants, while professing to make it a part of their method of charge that a consumer who saves 25 per cent. by going on the two-part tariff is to be specially assessed, yet in practice in numerous cases do not specially assess consumers who make that saving, they must justify what appears B to be a clear infringement of sects. 19 and 20. I have at some length shown how, at the date of the writ in this action, the defendants were insisting on the necessity of imposing on the plaintiff a fixed charge of £15 though, if based on floor area only, it would be £7 0*s.* 6*d.* It was, therefore, instructive to find out whether at the same date other houses C whose normal assessment would be £7 0*s.* 6*d.* remained at that figure notwithstanding a 25 per cent. saving. It appeared that, after the writ had been issued, and in consequence of it, a scrutiny was undertaken to see whether special assessments had in fact been made in all the cases in which in theory they should have been made, and forthwith it was D discovered that in 3 out of 15 houses of the £7 0*s.* 6*d.* class, the special assessment which ought to have been made had not been made. These were "Kingfishers," The Drive, Kingston Hill, the fixed charge on which was put up from £7 0*s.* 6*d.* to £26, "The Brake," Almer Road, Wimbledon, the fixed charge on which was similarly put up, and 9, Highbury Road, E Wimbledon, the fixed charge on which was advanced to £17 10*s.* In other cases also it was ascertained that there had been a failure to act up to the principle which is alleged to have guided the chief engineer. I am far from satisfied that all, or even the greater part of, such cases were discovered.

F No one, I think, could have examined the numerous files that were brought before the court, and listened to the explanations of the chief engineer, without coming to the conclusion that, but for the plaintiff's action, the anomalies of which he complains would have continued. At the date of the writ, there were many cases—I need take no more than G the three glaring instances which I have mentioned—which make it impossible to say of the relator that he was getting a supply on the same terms as other consumers in similar circumstances were getting a corresponding supply. It appears to me to be irrelevant that the undertakers, upon the discovery of such cases, have chosen to put up their H fixed charge above that of the relator, and not to bring down his to theirs. The fact was that, for a period before the date of the writ, other consumers were getting a supply upon terms which, in relation to him, were a clear infraction of both sects. 19 and 20. They cannot, in my judgment, justify it by saying that it was the other consumers who were assessed too low, and not the relator who was assessed too high.

If the facts had been otherwise, and if the method of assessment had been plain for all the world to see, and a mistake had been made which, upon discovery, was immediately redressed, it might have been unnecessary for the court to intervene. Here, however, from first to last, the defendants have been sedulously evasive, and it was only under the stress of these proceedings that it was revealed that the chief engineer acted, or purported to act, upon some basic principle in making special assessments, and that in several conspicuous cases this principle had not been observed. The plaintiff had, in my judgment, no other course open to him than to bring his action, and he is entitled to relief. I have already indicated that I am not disposed to grant an injunction which would debar the defendants from operating by agreement this or any other kind of two-part tariff. It will meet the case, I think, if I grant an injunction following the language of sects. 19 and 20 of the Act. It will be sufficiently clear from what I have already said that the attempt to impose upon the relator alone among consumers a limit of maximum demand cannot be justified.

I must add a word upon a further claim raised by the relator. He claims a declaration that he is entitled to be informed of the basis and method by which the annual fixed charge on his house was assessed. I do not think that there is any foundation in law for this claim. The plaintiff need not enter into an agreement with the defendants unless he likes, and they, if they like, may make it a term of the agreement that he shall not know the basis and method of charge. That they may run grave risks by taking such a course is shown by this case, and it is in fact much to be deprecated that any local authority undertaker should endeavour, as the defendants have done, to conceal the basis and method of charge. Adjustments of an arbitrary nature are in any case to be avoided. When the further claim to make such adjustments behind a screen is made, and when information properly sought is denied, the way is paved to suspicion and discontent, and not without justification. I am content to assume that the existing and gross anomalies which, as the result of this action being brought, were brought to light and put an end to, were due to carelessness in administration. However, it wants little knowledge of public or local administration to appreciate that the exercise of such a power in secret might lead to grave abuse. If the result of the plaintiff's action is to end a system in Wimbledon which has, as I understand, been adopted by no other electricity undertaking, he will have done good service to the community. The court will accept an undertaking that the defendants will supply to the relator plaintiff electricity on the same terms as those on which any other person in the area is entitled, in similar circumstances, to a corresponding supply, and will not show undue preference to any other person over the plaintiff.

Solicitors: *Baileys* (for the plaintiffs); *Herbert Emerson Smith*, Town Clerk, Wimbledon (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

POWELL *v.* GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 12, 1939.]**

Workmen's Compensation—Course of employment—Locality risk—Engine fireman hit by pellet from airgun aimed at engine.

A fireman employed by a railway company, being at the time on his engine carrying out his duties, was hit by a pellet from an airgun deliberately aimed at the engine by a boy of nineteen years of age. The question was whether this was an accident arising out of and in the course of his employment:—

HELD: the man's work brought him to the place where there was the risk of being injured by a pellet from the airgun, and the accident, therefore, arose out of the employment.

[EDITORIAL NOTE. It is held to be clearly proved that the man's employment brought him to the place where the risk here in question existed, and that, therefore, the accident was one arising out of the employment. It will be noted that the gun was deliberately aimed at the engine.

AS TO LOCALITY RISK, see DIGEST, Vol. 34, pp. 270, 271, Nos. 2295-2301 and pp. 320, 321, Nos. 2619-2626; and see WILLIS'S WORKMEN'S COMPENSATION, 32nd. Edn., pp. 102-106.]

Cases referred to:

(1) *Thom (or Simpson)* v. *Sinclair*, [1917] A.C. 127; 34 Digest 320, *2619*; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220.

(2) *Upton* v. *Great Central Ry. Co.*, [1924] A.C. 302; 34 Digest 276, *2336*; 93 L.J.K.B. 224; 130 L.T. 577; 16 B.W.C.C. 269.

(3) *Challis* v. *London & South Western Ry. Co.*, [1905] 2 K.B. 154; 34 Digest 315, *2585*; 74 L.J.K.B. 569; 93 L.T. 330; 7 W.C.C. 23.

(4) *Dennis* v. *White (A. J.) & Co.*, [1917] A.C. 479; 34 Digest 321, *2627*; 86 L.J.K.B. 1074; 116 L.T. 774; 10 B.W.C.C. 280; *revsg.*, [1916] 2 K.B. 1.

(5) *Lee* v. *Breckman (S. & I.) & Co.* (1928), 138 L.T. 610; Digest Supp.; 21 B.W.C.C. 32.

APPEAL by the railway company from an award of His Honour JUDGE REEVE, sitting in the Worcester County Court, dated June 15, 1939. The applicant was a fireman employed by the respondent company on a locomotive. During the course of his employment, his engine halted, and he signalled to a signalman by waving his hat, to indicate that the driver wanted the "all-clear" signal. As his locomotive moved off, he was struck in the eye by a pellet from an airgun fired in mischief by a boy of 19 standing on ground adjoining the track. He was disabled for a time, and claimed compensation and a declaration of liability. The judge decided that the injury was caused by accident arising out of the employment. The particular employment rendered him more liable than any other member of the public to meet with this accident. This specific offence was penalised by the Offences against the Person Act, 1861, s. 33, and, therefore, the legislature considered it to be a danger to the public. The Court of Appeal in *Challis* v. *London & South Western Ry. Co.* (3) recognised the tendency of mischievous boys to throw missiles at a train in motion, and evidence had been given to the same effect.

The county court judge gave a declaration of liability, and made an award of £23 8*s*. The respondents appealed.

Gilbert J. Paull, K.C., and *F. Bertram Reece* for the appellants.

F. W. Beney for the respondent.

Paull, K.C.: The judge was wrong in law in holding that the pro-
vision in the Offences Against the Person Act, 1861, s. 33, against throw- A
ing stones at engines decided the point at issue. His Honour also failed
to appreciate the difference between *Challis's* case (3) and the present
case. There was no evidence here of special risk. This man was no
more exposed to this risk than was any other member of the public.
The deliberate firing of an airgun at a stationary train by a youth of 19 B
must be distinguished from the dropping of stones by small children
from a bridge on to a locomotive travelling at 50 m.p.h. [Counsel
referred to *Thom (or Simpson)* v. *Sinclair* (1), where the man was injured
by the fall of a roof, and *Dennis* v. *White (A. J.) & Co.* (4), where he was
injured in a street accident]. There must be some special exposure to C
the injury incidental to the work. Here there was none. This was an
assault, and the case is governed by *Lee* v. *Breckman (S. & I.) & Co.* (5),
in which a van driver was assaulted by a carter whose van he was loading
and the injury was held not to arise out of his employment.

Beney was not called upon. D

Slesser, L.J.: The facts of the case are not in dispute, and are
very simple. The injured workman was engaged by the appellant
railway company as a fireman. At a time when his train was going
very slowly, and he was apparently making some indication to a signal- E
man with regard to the signal, an ill-disposed person, described some-
times as a lad, sometimes as a man, and sometimes as a boy—it does
not matter which he was, he was nineteen years of age—deliberately
aimed a pellet, as is now admitted, at the engine. That is the definite
admission which has been made. In so doing, he missed the engine, F
but unfortunately hit this man with a pellet, and the man suffered
injury as a result of the hitting. The injured man took proceedings
against his employers, and succeeded in getting compensation. The
appeal is now brought primarily upon the ground that it is not shown
on the evidence that this man's particular work brought him into a G
position where the risk of being injured by this airgun was any greater
than the risk to any other member of the public. In other words, this
casualty did not arise out of his employment.

I think that that matter is very clearly and sufficiently summarised
in Willis on Workmen's Compensation, 32nd Edn., p. 102, under the H
heading "Locality risk":

> A workman who by the conditions or obligation of his employment has to work in a particular place is subject to the risks attending his presence there, and any accident occurring to him through having to occupy that position and place, whilst legitimately working there, will be one arising out of his employment...

That seems to me to be a summary of the effect of certainly two decisions of the House of Lords, *Thom* (*or Simpson*) v. *Sinclair* (1) and *Upton* v. *Great Central Ry. Co.* (2).

As regards *Thom* (*or Simpson*) v. *Sinclair* (1), the facts were simply these. A girl who was working in a shed was injured while at work there because an adjoining brick wall, in the course of erection for a neighbour, fell down and brought down the roof of the shed in which she was working, and injured her. It is a Scottish case. In the Second Division, the award was set aside on the ground that the accident did not arise out of the employment, but it was held in the House of Lords that the girl was entitled to compensation, because the conditions of her employment obliged her to work in that particular place, and so subjected her to any dangers which might specially attach to that building. It is unnecessary to read the opinions, which are all in agreement upon the point, save only that VISCOUNT HALDANE says, at p. 134:

> But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category [the category of a case where there is no reason why an accident should happen to a man in one situation rather than to a man in another]. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment.

Then there is a passage which I need not read, from the opinion of LORD DUNEDIN in *Upton* v. *Great Central Ry. Co.* (2) to the same effect.

If one applies those principles to this case, this man was required, as part of his employment, to be on this engine. While on this engine, he was subjected to a particular peril, in that a misguided youth aimed at the locality where this man was required to work. In my opinion, the problem in the cases of assault of whether the assault on the man arises out of some danger which exists by reason of his employment, or whether it arises out of a quarrel which had no relation to the employment, does not arise here. This is a case of a man being, by reason of his work, brought into a locality which was dangerous. Whether it was dangerous when he went into the locality, as in the case, for example, of certain ships being required to go into a mine-infested area, or whether it became dangerous after he got into the locality, by reason of somebody shooting at him, or dropping a bomb on the engine, or whatever it may be, matters nothing. This man suffered this casualty in the course of his employment, and it arose out of the employment, because he was at that place. It was by its very nature a place which was rendered dangerous by the shooting of the gun, and, therefore, it follows that the judge was right in awarding him compensation.

MACKINNON, L.J.: I agree.

GODDARD, L.J.: I agree. I only want to say one word with regard to *Challis* v. *London & South Western Ry. Co.* (3), because that was much relied upon below, and, indeed, the judge based his judgment upon it. *Challis's* case (3) was decided at a time when the courts were proceeding to lay down the principles, so far as they were to govern the interpretation of this Act, and, naturally, were proceeding cautiously. For the first time, I think it is right to say, in *Challis's* case (3) this court was faced with the problem of whether or not an injury which is caused by a criminal act committed by a third party can be said to be an accident arising out of and in the course of a man's employment. Both SIR RICHARD HENN COLLINS, M.R., and COZENS-HARDY, L.J., in the judgment which they delivered are really seeking to show how the criminal act of the third party could have been treated as an accident. MATHEW, L.J., with the robustness which one is accustomed to find in his judgments, said, at p. 158:

> In common parlance the accident which happened in this case would be said to have arisen out of the workman's employment; and I cannot see why the Act should not be construed according to the fair meaning of the words employed in their ordinary sense.

With those words I may say I respectfully agree, more particularly because in recent years the courts have moved very much further in these matters. *Thom (or Simpson)* v. *Sinclair* (1) shows the extent to which the courts have gone.

In this particular case, the accident arose because a boy shot an airgun deliberately at a locomotive engine on the railway, and, missing that somewhat large target, he hit the fireman standing in the cab of the engine. The fireman had to be there. If he had not been there, he would never have been injured. His service and duty required him to be there. Therefore, I entirely fail to see how it can be argued that this accident did not arise out of his employment, quite apart from the question of whether or not trains are an allurement to children. It seems to me that that does not matter. The deliberate act which here caused the accident was the firing at the engine. The accident happened to the workman because the workman's duty required him to be on the engine. Thus, it seems to me to follow that the accident arose out of his employment.

Appeal dismissed with costs.

Solicitors: *A. G. Hubbard* (for the appellants); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

BOMFORD *v.* OSBORNE.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **November 3, 6, 7, December 20, 1939.]**

Income Tax—Schedule B—Nurseries and market-gardens—Mixed farm—Apportionment of assessment—Income Tax Act, 1918 (c. 40), *Sched. B, r.* 8.

Where a farm is worked as a mixed farm, but as one unit, the commissioners can apportion the assessment, assessing one part of the land as a farm and the other part as nurseries or gardens for the sale of produce under the Income Tax Act, 1918, Sched. B, r. 8. This is so even where, by a rotation of crops, garden crops are in one year grown on a part of the land which is in other years used for farm crops.

Decision of **LAWRENCE, J. ([1939] 3 All E.R. 259)** ***affirmed.***

[EDITORIAL NOTE. On the point here considered, there was a *dictum* by FINLAY, J. (as he then was), in *Dennis* v. *Hick* (10), and a decision of the Court of Session in Scotland in *Lowe* v. *Inland Revenue Comrs.* (11). LAWRENCE, J., while saying that he preferred the *dictum* of FINLAY, J., felt bound to follow the decision of the Scottish court. By a majority the Court of Appeal have affirmed the decision of LAWRENCE, J. This matter is of great importance to farmers, who, as a part of their general farming operations, grow a certain amount of garden crops. For the purpose of arriving at a proper assessment to tax, it will be necessary, under the decision here given, for them to call in expert accountants, who can apportion the various expenses of the farm in respect of the part of the farm used for garden produce. It may well be that the profit from a farm of moderate size will not be able to bear this additional expense. A further objection to the construction of Schedule B here adopted is that the question is made, for all practical purposes, a matter for the decision of the local commissioners, whose decision, being one of fact, cannot, as FINLAY, J., pointed out in *Dennis* v. *Hick* (10), be questioned in a court of appeal so long as there is some evidence to support it. The result is that there is a great possibility of conflicting assessments in different parts of the country.

AS TO NURSERIES AND MARKET GARDENS, see HALSBURY, Hailsham Edn., Vol. 17, p. 72, para. 145; and FOR CASES, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to:

(1) *Monro & Cobley* v. *Bailey* (1933), 102 L.J.K.B. 471; Digest Supp.; 148 L.T. 505; 17 Tax Cas. 607.

(2) *Lean* v. *Inland Revenue,* [1926] S.C. 15; Digest Supp.; *sub nom. Leen & Dickson* v. *Ball,* 10 Tax Cas. 341.

(3) *Back* v. *Daniels,* [1925] 1 K.B. 526; 28 Digest 15, *74*; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183.

(4) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.,* [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.,* [1930] 1 K.B. 304.

(5) *Re Mayfair Property Co., Bartlett* v. *Mayfair Property Co.,* [1898] 2 Ch. 28; 10 Digest 734, *4593*; 67 L.J.Ch. 337; 78 L.T. 302.

(6) *Birmingham Corpn.* v. *Barnes,* [1935] A.C. 292; Digest Supp.; 104 L.J.K.B. 281; 152 L.T. 558; 19 Tax Cas. 195.

(7) *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315; 28 Digest 6, *13*; 51 L.J.Q.B. 626; 45 L.T. 145; 1 Tax Cas. 287.

(8) *Knowles* v. *McAdam* (1877), 3 Ex.D. 23; 28 Digest 6, *12*; 47 L.J.Q.B. 139; 37 L.T. 795; 1 Tax Cas. 161.

(9) *Wakefield Rural Council* v. *Hall,* [1912] 3 K.B. 328; 28 Digest 55, *279*; 81 L.J.K.B. 1201; 107 L.T. 138; 6 Tax Cas. 181; *revsg.* [1912] 2 K.B. 265.

(10) *Dennis* v. *Hick* (1935), 19 Tax Cas. 219 ; Digest Supp.

(11) *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (1938), 21 Tax Cas. 597 ; Digest Supp.

(12) *Kerr* v. *Davis* (1939), Tax Cases Leaflet No. 1020.

(13) *Williams* v. *Rowe* (1939), Tax Cases Leaflet No. 1023.

(14) *Re Hammond, Ex p. Hammond* (1844), De G. 93 ; 4 Digest 21, *133* ; 14 L.J.Bcy. 14 ; 4 L.T.O.S. 215.

(15) *Purser* v. *Worthing Local Board of Health* (1887), 18 Q.B.D. 818 ; 38 Digest 458, *233* ; 56 L.J.M.C. 78.

(16) *Cooper* v. *Pearse*, [1896] 1 Q.B. 562 ; 42 Digest 6, *24* ; 65 L.J.M.C. 95 ; 74 L.T. 495.

(17) *Stewart* (*or Watters*) v. *Hunter*, [1927] S.C. 310 ; Digest Supp. ; [1927] Sc.L.T. 232.

(18) *Keir* v. *Gillespie*, [1920] S.C. 67 ; 28 Digest 16, case *e*.

(19) *Macpherson & Co.* v. *Moore* (1912), 6 Tax Cas. 107 ; 28 Digest 34, case *177i*.

(20) *Hughes* v. *Bank of New Zealand*, [1938] A.C. 366 ; [1938] 1 All E.R. 778 ; Digest Supp. ; 107 L.J.K.B. 306 ; 158 L.T. 463 ; 21 Tax Cas. 472.

APPEAL by the taxpayer from an order of LAWRENCE, J., dated May 26, 1939, and reported [1939] 3 All E.R. 259, where the facts are fully set out.

Rt. Hon. Sir William Jowitt, K.C., and *L. C. Graham-Dixon* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

Jowitt, K.C.: Since it has been held by the commissioners that the appellant is carrying on a mixed farm as one unit, the assessment of such a farm cannot be split. It must be treated as an ordinary farm, and must be assessed on the annual value. If the court holds that it is in order to assess these lands on two separate principles, it becomes material to know if the nature of the use of the land is the determining factor. [Counsel referred to *Keir* v. *Gillespie* (18), *Back* v. *Daniels* (3), *Monro & Cobley* v. *Bailey* (1), *Dennis* v. *Hick* (10) and *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (11).]

The Solicitor-General: It would lead to confusion if this court should try to lay down any definite criteria. [Counsel referred to *Kerr* v. *Davis* (12) and *Williams* v. *Rowe* (13).] The return made should be a return of the profits as a market-gardener, irrespective of the particular fields from which the produce is derived. That the assessment may be divided according to the user of the land is clear from the fact that the statute expressly says that buildings may be assessed on a different basis, and also from the provision that woodlands managed as a commercial undertaking may be assessed differently. The court must have regard to the holding, and must see if there are any lands which are used as market-gardens. The nature of the produce is not the sole test of a market-garden.

Hills: By "lands used as gardens" the statute means, according to the authorities, that the main determining factors are the nature of the produce, and whether or not it is intended for domestic consumption.

Prima facie, where fruit is exclusively grown upon the land, it is a garden. The obvious purpose of r. 8 is to meet a case where the assessment on the annual value does not give a fair assessment of the profits obtained. The question is whether or not the land is occupied as gardens, and not whether or not it is a garden. [Counsel referred to *Re Hammond, Ex p.* A *Hammond* (14), *Stewart* (*or Watters*) v. *Hunter* (17) and *Cooper* v. *Pearse* (16).] The treatment of hop-gardens shows that it is possible to split the assessment. [Counsel referred to *Macpherson & Co.* v. *Moore* (19) and *Hughes* v. *Bank of New Zealand* (20).]

Graham-Dixon, in reply.

B

SCOTT, L.J.: This is an appeal by the taxpayer from a judgment of LAWRENCE, J., dismissing an appeal, except on one point, on a case stated by general commissioners for income tax for the Pershore West Division of Worcestershire, who had, on appeal to them, affirmed original C assessments, in respect of an area of land in that county containing 553 acres gross and 536 net (after deduction for house, farm buildings, etc.), of which the appellant was both owner and occupier. The assessments against which he was appealing had divided the total net area of land—that is, the 536 acres—into two categories, arable, 229 acres, D and "the remainder"—that is, 307 acres, made up of 40 arable acres under hops, 82 acres of mowing grass, 178 acres of grazing and 7 acres of osiers. The original assessments treated the whole of the arable land (other than the 40 acres under hops) as land occupied by the appellant as "a nursery or garden," and, therefore, as falling to be assessed under E the provisions of the Income Tax Act, 1918, Sched. B, r. 8, on the actual profits thereof made in the preceding year, and not on the ordinary basis of Sched. B—namely, the annual value of the land. That rule is as follows:

> F The profits arising from lands occupied as nurseries or gardens for the sale of the produce (other than lands used for the growth of hops) shall be estimated according to the provisions and rules applicable to Sched. D, but shall be assessed and charged under this schedule as profits arising from the occupation of lands.

If LAWRENCE, J., had felt free to exercise his own judgment, he would, I think, have decided that, on the commissioners' findings viewed as G a whole, there was no evidence of the land being "occupied as nurseries or gardens," in the phrase of the rule. However, he felt bound by a Scottish case to affirm the decision of the commissioners as to the larger part of the arable, although disagreeing with them as to a part which they had included as "nursery or garden" only because they thought H it "ancillary" to the nursery or garden. On that part, he held that there was no evidence. I find myself in agreement with that minor decision, and also with the main decision which he would have liked to give, and I do not think that he need have regarded the Scottish decision as applicable. Both my colleagues, however, have come to the conclusion that the appeal should be dismissed.

The occupation of land under hops as well as of nurseries and gardens was, by the Income Tax Acts of 1806 and 1842, specially charged on profits, but hop-lands were removed from that category and made chargeable under Sched. B under the general rule of annual value by the Income Tax Act, 1853, s. 39, and have remained so chargeable ever since. It was, therefore, properly placed by the commissioners in the same category as the rest of the land which had been treated in the original assessment as ordinary farming land, and accordingly assessed on annual value. The taxpayer contended throughout that he should have been so assessed on the whole 536 acres, and not only on the 307. The two figures of the original assessments were respectively £2,000 for the arable land and £495 for the rest. The appeal commissioners, however, dealt only with questions of principle, and kept open all questions of amount, so that this court is not concerned with money figures. Counsel for the appellant in opening the appeal before us said that the case was of great general importance to farmers. I agree, but would add that the question raised is also of importance to the whole community, for, if the decision stands, it will, in my belief, lead indirectly to a serious decrease in the total supply of culinary vegetables and small fruit available to our urban populations. The reasons for my belief are these. Farmers as a class attach great importance to their present statutory privilege of being taxed on the annual value of the land they occupy. It saves them from the complications of agricultural accountancy for tax purposes, and that is probably the main reason why so few farmers have elected for Sched. D under Sched. B, r. 5, because Sched. B itself protects them from the risk of the Sched. B basis being an unfair measure of their taxable profit, since r. 6 enables a farmer who can prove a loss or a smaller profit than the figure of his annual value to claim assessment, or even repayment, on his actual pecuniary results. The more skilful farmer, on the other hand, whose profits often exceed the figure of his annual value, derives substantial fiscal benefit from his Sched. B basis. The fact that such advantages are thus conferred by the ordinary rule of Sched. B on all farmers, whatever their profits, accounts for their dislike of being compulsorily charged on profits. They have enjoyed the annual value basis ever since 1806, when the occupation of land was first definitely separated from ownership and made a separate charge by Addington's Income Tax Act, 1806. From 1806 to 1930—a century and a quarter—I have found no record in any law report of any attempt to tax farmers under r. 8. During the last half-century, there has been an enormous improvement in marketing facilities for farmers through the development of quick motor transport over our wonderful system of good country roads, accompanied by competitive improvement of railway facilities. The direct consequence has been that British farmers have been enabled to include small fruits and culinary vegetables in their list of ordinary farm crops wherever the conditions of soil, climate and altitude are favourable, and the indirect

consequence has been a very great increase in the available supplies of both to our urban populations, with corresponding benefit to the health of the nation. If r. 8 is rightly construed and applied by my colleagues, I fear that no farmer will feel safe in growing even a few fields of fruit or vegetables, lest those fields should be held to constitute a "garden"
A or gardens, and so expose him to the necessity, not only of keeping separate accounts in respect of those fields, but also of producing completed accounts for the year preceding the year of assessment upon which the estimate of "garden" profits would have to be based as required by the Finance Act, 1926, s. 29 (1), although during that year
B corn or other ordinary farm crops may have been grown on those very fields. This risk will, I am convinced, tend to deter farmers from growing such crops, to the detriment of the supplies of vegetables and fruit to the population at large. Of course, if the rule *clearly* had the meaning which, in my respectful opinion, would alone justify my colleagues'
C decision, the considerations I have mentioned would be irrelevant. If, however, it is not clear in their sense, those considerations, in my opinion, do have materiality in connection with the statutory and judicial history of the provision, and particularly in ascertaining its original object and meaning when first introduced in 1806, for there has been no change of
D language material to the present question of interpretation since 1806, except for a quite minor change in the language referring to hop-lands, which, for a reason I will mention presently, can be disregarded. Moreover, if the language of the rule is not clear beyond reasonable doubt, the principle of construing a taxing Act strictly, in my opinion, should
E also apply to protect the taxpayer here. Having regard to my colleagues' opinion, I need hardly say I express my own dissentient view with diffidence, however strongly I may hold it. Sched. B, r. 8, does not appear to me, on its true interpretation, to be capable of bearing the meaning attributed to it in the present case by the commissioners
F and my colleagues, but at least, if it is ambiguous, its statutory history and the material circumstances commonly known at the time of its introduction in 1806 appear to me sufficient to establish the construction which I put upon it. I feel bound, however, as I am differing, to explain my reasons fully, and, in any event, perhaps my analysis of the policy
G which appears to me to have dictated the very limited scope of the original enactment (as I construe it) may be of some use should any question of legislation arise.

Although the substance of the rule was enacted as long ago as 1806, I know of only five reported cases under it, the first of which, *Monro &*
H *Cobley* v. *Bailey* (1), began in 1930 and ended in 1932, when the House of Lords held that, in that case, it was not possible to say that there was no evidence upon which the commissioners could apply r. 8. I shall return to that case in a moment, but the other four cases all seem to me to disclose an absence of any clear and definite interpretation of the rule. At any rate, I find it impossible to deduce from them any plain

meaning of the statutory phrase "nurseries or gardens." I do not suggest that the interpretation is easy, but one cannot help being struck by the apparent inconsistencies in either interpretation or application of the words as between the different tribunals of fact—that is, the commissioners—and counsel for the appellant was instructed to say that the case was important just because of such inconsistencies:

> . . . as between commissioners up and down the country, who seem to arrive at opposite findings without any plain difference in the facts.

I know of no case where the meaning and scope of the word "garden" in the rule have been the subject of judicial explanation, and I can find no clear criteria in the reported decisions for answering the basic question: "What does r. 8 mean by a 'garden'?" In *Monro & Cobley* v. *Bailey* (1), the Court of Appeal and the House of Lords both held that the question of the character of the occupation was one of fact for the commissioners, and that it was impossible to say in that case that there was no evidence before the commissioners to support their finding that the whole of the land in question was occupied as a garden. However, neither court found it necessary for the purpose of that case to interpret the words "nurseries or gardens" in the rule. The only light upon their meaning is, therefore, to be gathered from the commissioners' findings of fact which were in the minds of their Lordships—namely, that the holding was wholly arable, that it covered 200 acres, of which 60 acres were under bulbs, that there was 1 acre covered by 13 glasshouses which the taxpayer conceded was chargeable under r. 8, that the main purpose of the occupier was the growing and selling of bulbs, and, in a secondary degree, of their flowers, that the whole 200 acres were essential for that business because of the horticultural necessity of transplanting bulbs to fresh ground each season, that the sales of bulbs and flowers realised in the year in question nearly £14,000, against £1,600 from general farm crops, and that the cost of labour was £27 per acre on the bulbs, which was "far in excess" of the average price of ordinary farming in the locality. On these findings, it was held that there was *prima facie* evidence of "occupation as a garden." I venture to think, however, that the actual decision goes no further towards defining the word "garden" than holding that, with such concomitant facts as were there present, bulb-growing may satisfy the meaning of the word "garden" in the rule, so far as the crop produced is concerned.

Before I discuss the legal position, it is necessary to state carefully the chief findings of fact in the present case. The lands composing the "holding" (as I will call it in order not to beg any question by calling it the "farm") lay in Worcestershire. The main part was called Springhill, and covered 508 acres out of the total of 553. The appellant, however, had a further 10 acres called Fingerpost Ground, 7 called Lower Moor, and 28 called Willspit, thus making the grand total 553 acres. However, as that figure included the 17 acres occupied by buildings or the precincts of buildings, which were excluded from these assessments, the case is only concerned with 536 acres. Apart from the 40 acres of hops, all the arable land was in Springhill, except for the 17 acres of Fingerpost Ground and Lower Moor. In the year of assessment, there were on the holding 229 acres of arable (apart from hoplands)—namely, 11½ acres of fallow, 40½ acres of ground and bush fruit, 17 acres of plums, and the following acreages of various other crops: wheat 16 acres, potatoes 7 acres, mangolds 3 acres, lucerne ½ acre, peas 26½ acres, beans 18½ acres, brussels sprouts 44½ acres, savoys 4 acres, cauliflowers 18½ acres, leeks 3½ acres, carrots 4 acres, parsnips 6 acres, asparagus 2 acres, plants 5 acres, rhubarb 1 acre. There were no glasshouses, there was no nursery, and there was no bulb-growing. The commissioners did not suggest that there was any separation in fact which would enable them to split the holding geographically into separate and self-contained units of occupation, and to point out which unit they considered farm land, and which they considered garden. On the contrary, in order to arrive at the total acreage of what they called garden, they merely added up the acreages of the fields actually *in the particular year of assessment* appropriated for longer or shorter periods of cultivation to fruit-growing, or to such green or root crops as they thought were distinctively garden crops, and then they said that the rest of the arable land was "ancillary" to the gardening, with the result that they considered all the arable fields to be occupied as "garden." There is nothing in their findings of fact to indicate that the fields they added together were not scattered over the whole holding, so as to be interspersed with mowing grass or pasture fields. Indeed, it was common ground, as we were informed, that the arable fields were in fact so interspersed. Included in the commissioners' garden acreage were about 20 acres of indisputable farm crops, wheat, mangolds, and lucerne, nearly 80 acres under vegetable crops, or sorts which are commonly seen up and down the country growing on various fields of farms where the soil is suitable, often in the ordinary course of farm crop rotation, such as potatoes, peas, beans, brussels sprouts, savoys, cauliflowers, etc., not to mention another 6 acres devoted to parsnips, a common feed for stock, as we were told, and stated in the case to have been grown on this holding for that purpose, and, finally, the 11½ acres of fallow.

The case is stated in considerable detail, and it is not possible to do it justice without quoting the actual language of the salient findings of fact, which are as follow :

> (*b*) The following live stock was kept by the appellant: 16 horses, 90 cattle, 232 sheep, 1,012 pigs, 8,045 poultry. The horses worked upon the farm. Cattle, sheep, pigs and poultry were produced and bred by the appellant upon the land. (*c*) The whole acreage occupied by the appellant was worked as a single mixed farm in one unit. The appellant employed ordinary farm-labourers, who were not highly skilled. (*d*) The appellant used very up-to-date appliances and practised mechanised farming over the whole farm. The minimum of hand labour was used in producing crops upon the arable land, much of it being machine-planted and machine-hoed. (*e*) The appellant was a registered producer under the Pigs Marketing Scheme. (*f*) The wheat was grown partly to obtain the subsidy payable under the Wheat Act and partly to provide straw litter for the pigs. The mangolds,

> parsnips and lucerne were grown to provide feed for the stock and horses. (*g*) The livestock, pigs and poultry were kept not for the purpose of providing manure for the arable and pasture land but for their fattening and sale. (*h*) During the winter, the poultry had access to the arable land. (*i*) The purchases and sales of livestock in 1936 were £5,386 1*s.* 6*d.* and £22,147 10*s.* 7*d.* respectively. (*j*) The wages for the year amounted to £9,684 17*s.* 10*d.* A big proportion of this expenditure was incurred in relation to the pigs and hops. The numbers of regular employees were 80 men and 29 women. These workers worked indiscriminately upon the whole farm, whether upon the sheep, pigs, cattle and poultry, or upon the pasture and/or the arable land, often being engaged upon different parts of the farm at different times in the same day. . . . (*l*) The purchases of artificial manures amounted to £1,471 8*s.* 6*d.* only and had been progressively reduced year by year as the manure produced by the pigs increased. (*m*) The purchase of feeding stuffs amounts to £10,939 4*s.* 2*d.* (*n*) There are no glass-houses on the land occupied by the appellants and no nursery work was done upon any part of the land. (*o*) The methods of cultivation were the ordinary accepted agricultural methods.

Of the facts so found, the most significant is (*c*)—namely, that the whole acreage of 536 acres " was worked as a single mixed farm in one unit "—especially when it is supplemented by the further finding in (*d*) as to the method of cultivation, that the appellant " practised mechanised farming over the whole farm." The finding marked (*g*) is a little ambiguous, but I think its effect is that the keeping of livestock, pigs and poultry was not merely ancillary to the vegetable-growing. This inference is borne out by subparas. (*b*), (*i*) and (*m*), which disclose livestock farming on a large scale. Subpara. (l) seems to show that the pig manure produced was in fact used throughout the holding, and helps to explain subpara. (*g*), which, I think, should be construed as if it had read : " The livestock, pigs and poultry were kept primarily for the sake of fattening and selling them, although they also served the purpose of providing manure." Subpara. (*h*) is equally important with subpara. (*l*) in its indication of the economic inter-action between the two farming activities prosecuted by the appellant—livestock-rearing and arable cultivation—which made it a " mixed farm." As the former furnished manure to, and consumed waste-products of, the arable crops, so the " fruits of the arable land " throughout the winter supplied food to the large head of poultry which were run over it, an aspect which the Court of Session in *Lean* v. *Inland Revenue* (2) thought an important characteristic of husbandry. Subpara. (*k*) contains an obvious arithmetical error, as £12 x 536 acres equals £6,432, and not £9,684, as stated in subpara. (*j*), for wages over the whole farm.

The commissioners' conclusions were as follow :

> (1) That the farming operations on the arable land (apart from that used for the growth of hops) are ancillary to the market garden operations. (2) That the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. (3) That the remainder of the land occupied by the appellant is devoted to farming operations and is assessable under the ordinary rules applicable to Sched. B.

The issue before us are whether conclusions (1) and (2) involve errors of law. In my opinion, they do, and I think that it will be convenient at once to formulate the questions which seem to me to call for decision, and to state, with reasons, the opinions which I have reached, for I do not think that the points raised are covered by any judicial decision binding on this court.

Of the detailed findings upon which the commissioners purported to base their conclusions, subparas. (*c*) and (*d*) are the most far-reaching. If they are read together, I regard them as a finding of fact that the
A whole area of 536 acres was farmed as one unit, and that that unit was in fact a single mixed farm, partly arable, partly grass. These positive findings, considered with due regard to the absence of any finding either that there was a physical line of local demarcation between what was admittedly farm and what the commissioners held to be garden or that
B the appellant was conducting two businesses, one farming and the other market-gardening, show that the commissioners themselves did not regard the farm as being really severable into two separate units of occupation. Indeed, they find expressly in subpara. (*o*) that the whole of the arable was cultivated by " ordinary accepted agricultural methods,"
C or, in other words, that the gardener's art—horticulture—was *not* practised or even attempted. I do not, and could not in the light of the decision in *Monro's* case (1), suggest that finding (*o*) is conclusive, but it does seem to me to indicate the absence of one important characteristic of gardening, especially when accompanied by the positive findings in
D subparas. (*c*) and (*d*). For these reasons, I think that the facts found in the case rule out any possibility in law of the legitimate " splitting " of the total area into a farm unit and a garden unit. If, however, to the cultivation of fruit or vegetables the gardener's art was not applied, but only the arable farmer's art, on what definition of the word " garden "
E is it to be said that any individual field carrying potatoes or cabbages or fruit and lying between grain crops or meadows is a garden? Moreover, if it cannot be said of one field, the proposition cannot, either in fact or in law, be predicated of twenty fields picked out here and there from surrounding farmlands and added together by a sum in arithmetic
F to make up a notional " garden." There are, in my opinion, other reasons why the commissioners' method of approach to the problem of r. 8 is wrong in law. However, it has seemed to me convenient, first of all, to emphasise the impossibility of " splitting " in such a case as the present, especially as this aspect of the appeal is one of such practical
G importance to farmers. The commissioners' conclusions must depend primarily on whether the facts found can bring the congeries of individual fields totalling 236 acres, which in the year of assessment were carrying certain vegetables, bush and ground fruits, and fruit trees, within the word " garden." In my opinion, they cannot, for more reasons than
H one. Parenthetically, I would point out that we are not concerned with the words " for the sale of the produce," for there is no doubt that that requirement was fulfilled here. It was a necessary condition in framing the rule, as some pleasure gardens make profits of another kind.

I have no wish to attempt any exhaustive definition of the word

"garden," but I do not see how any court asked to apply r. 8 can avoid forming an opinion on some aspects of what is or is not a garden within r. 8. Such a garden connotes geographically, as it seems to me, a more or less defined and self-contained whole, or unit of area, cultivated according to the gardener's art. Hence the recognition by the commissioners in the reported cases of the need, first, of deciding whether A
or not all the non-garden land within the total unit of occupation is, in either a cultural sense or a business sense, or both, necessary to, and used for the purpose of, the garden—"ancillary" is the dubious word sometimes employed—and, if it is not, secondly of deciding as to the possibility of "splitting"—that is, of dividing the total area B
of occupation into two separate and self-contained parts, a farm and a garden. Acting on the legal hypothesis that the 236 acres here *could* constitute a garden, with which I disagree, the commissioners have been forced to resort to the "splitting" solution within the 236 acres, because of the obvious impossibility of treating the 307 acres of pure C
farm area, with its large livestock business, as "ancillary" to their "garden," although, by treating the total acreage of fields which in the year of assessment were arable as if it could be regarded as a true unit of occupation, they did have occasion to pray in aid the "ancillary" principle *within that unit of area*, because some fields carried obvious D
farm crops. Hence their first conclusion:

> That the farming operations on the arable land . . . are ancillary to the market garden operations.

So much for the principle of the self-contained unit of area as a necessary element in "a garden." That is a limitation in space. I think, E
however, that there is also a limitation in time, in the sense that there is a moment when the garden begins and another when it ends, and that some degree of permanent existence from year to year is connoted by the garden of r. 8. The general rule under Sched. B makes the valuation for Sched. A the basis for estimating annual value, and that is usually a F
more-or-less lasting figure. So, too, in "the provisions and rules applicable to Sched. D," incorporated for estimation by r. 8, the profits, formerly estimated on a 3-years' average, are now, under the Finance Act, 1926, estimated on the yield of the preceding year. In either case, the contemplation of the income tax statutes is that the *same* source G
of profit was flowing in the preceding period, whether 3 years or one, as is flowing throughout the year of assessment, unless the source only came into existence during the year of assessment, or during the preceding year, when special provisions for reckoning the profit apply. Here let me assume for the moment that the reasoning of the commissioners H
can apply in law to a mere arithmetical total of discrete fields. Even so, how could it be supposed that a *farm* profit of last year was intended by the rule to be the measure for estimating the quantum of a *garden* profit this year? For the purpose of the question, let me assume that every vegetable crop is a "garden" crop (although again I disagree

with that assumption). In the common practice of agricultural rotation. each field may change its annual crop each of the 3 to 5 years of the rotation cycle. In my view, that feature alone makes it impossible to suppose that Parliament intended that a field bearing cabbages this year should constitute a "garden" when its crop was last year, and may be next year, a patently farm crop—wheat last year and clover next year. Moreover, if the reasoning of the commissioners were right as to their congeries of odd fields, it would lead inexorably to the conclusion that each individual field, bearing a vegetable crop, or fruit, of itself constitutes a garden within the rule, because I can see no logical halting-place between 20 such individual fields constituting a big garden and one field being a little garden. However, I cannot think that it was the intention of Parliament in the rule to expose to the burden of separate accountancy and separate assessment every farmer who here and there on his farm grows one, or a few, or even a good many, fields of potatoes or cabbages, or, indeed, any one of the vegetable or fruit crops mentioned by the commissioners in the present case.

That brings me to another important aspect of the appeal. It seems to me that in ultimate analysis the real reason why the commissioners came to their second conclusion was that they thought the true determining characteristic or feature of a garden intended by the rule was the kind of crop grown, and that, if it was a kind of crop that persons who are beyond dispute market-gardeners do grow, then the land on which it was grown *must* be a garden within r. 8. A similar view appears in two of the decided cases. In my view, that is wrong, and wrong for more than one reason. In the first place, the natural meaning of the language of the rule appears to me to be such that Parliament must have intended to tax on profits only those who carried on the business of a market-gardener, and also cultivated their land in the way characteristic of market-gardeners—namely, in accordance with the gardener's art. That art is often very different in its methods and objects from the farmer's art. The gardener's methods, for instance, of treating soil and crop differ, regarded as a whole, from the farmer's. I say this quite apart from the difficulty in many gardens of using those mechanical methods which are characteristic of soil cultivation on the larger scale possible in farming, and some of which, indeed, are not economically practicable at all in the narrower limits of many market-gardens. In the second place, as agricultural knowledge advances, new crops appear on farms. This probably accounts for some of the increased cultivation of vegetables on farms. Why should that of *itself* constitute each such field a garden? Why should not an innovation in farming practice, when it has once become usual, turn what was a garden crop into an ordinary farm crop? That, in my opinion, is undoubtedly what happened long ago with potatoes. In other words, the type of produce cultivated on a farm, although admittedly one element in the problem, and, in the case of a

crop like bulbs, an important element (as it certainly was in *Monro's* case (1)), can afford *by itself* but little guidance, where the crop is not exceptional in character, and, where the crop is one *ancipitis usus*, because quite commonly grown on farms, it affords no guidance, because of the general rule of logic, and, therefore, of law, that a fact equally explicable by either of two explanations is no evidence of either. The A
potato is a good illustration of this rule of the law of evidence. Anyone who knows the countryside well knows that it is a very usual farm crop, so usual as to justify judicial notice of the fact. Everyone who shot partridges in the 'eighties and 'nineties will remember walking them up in ridged potato fields. In *Back* v. *Daniels* (3) (discussed and approved in B
Fry v. *Salisbury House Estate, Ltd.* (4) by VISCOUNT DUNEDIN, at p. 442, and by LORD ATKIN, at p. 456), potatoes were the only crop, and were treated throughout as an ordinary farm crop. The contest in the case was whether the Revenue could charge the profits under Sched. D as to the profits of a business. The Court of Appeal held unanimously C
that the Daniels were farmers in occupation of the land, and must be charged under the general rule of Sched. B. No one suggested that the crop was of a kind to make r. 8 apply, and it looks as if the Revenue had never imagined that it could apply. In *Monro's* case (1), the crop, although peculiarly a garden or even a nursery crop, was not the only D
feature which led both the Court of Appeal and the House of Lords to say that the applicability of the rule was a question of degree in each case, for there was there a defined unit, and the whole unit was occupied for the one main object of cultivating and multiplying on a large scale that one particular crop—namely, bulbs—and of selling their flowers. E
The finding was that the whole 200 acres were a necessity for growing 60 acres of bulbs. Bulbs had not at that date ceased to be a characteristic nursery or garden crop. I doubt if they ever will, for bulbs are grown either for the sale of their blooms or for sale as bulbs directly or indirectly to those who possess gardens, private or public. I confess that they do F
seem to me to constitute a true garden, or even nursery, produce, which may well be the reason that in *Monro's* case (1) neither this court nor the House of Lords thought it necessary, having regard to the other findings of fact, to say anything about the meaning of the word "garden." G

For the purpose of construing the present r. 8, and particularly for ascertaining the kind of garden to which the rule was originally addressed, it is important not merely (i) to see what other light is shed by the scope of the rule itself in its setting and wording to-day, but also (ii) to consider the statutory history of the provision, what its original form was, H
and what were the known facts to which it was originally applied, for (ii) has, I think, a direct bearing on (i). On the first point, it is to be observed that two other subjects of taxation are expressly mentioned—namely, nurseries and hop-lands. As to the word "nursery," I see no reason why the dictionary definition should not have been in the mind

of the legislature. JOHNSON'S DICTIONARY, 1st Edn., 1755, defines it as follows:

> A plantation of young trees to be transplanted to other grounds.

The CENTURY DICTIONARY, Vol. V, 1899, defines it as follows:

A
> A place where trees are raised from seed or otherwise in order to be transplanted; a place where vegetables, flowering plants, and trees are raised (as by budding or grafting) with a view to sale.

Bacon says of the word:

> Your *nursery* of stocks ought to be in a more barren ground than the ground is
B
> whereunto you remove them.

The OXFORD DICTIONARY defines it as follows:

> A plot or piece of ground in which young plants or trees are reared until fit for transplantation; a collection of such plants. Now usually a piece of ground of considerable extent in which the plants or trees are reared for sale; a nursery-garden.

C
I think that these coincide with the ordinary understanding of the word. It is, therefore, worth noting that the word associated with garden connotes (i) a definite horticultural purpose and method of growing, and (ii) a self-contained and homogeneous area devoted to that
D
purpose. *Noscitur a sociis* may be overdone, but whatever light the word "nursery" throws on the word "garden" supports a limited and definite meaning.

Dictionary definitions of the word "garden" are numerous. JOHNSON'S DICTIONARY, 1st Edn., 1755, defines it as follows:

E
> A piece of ground enclosed, and cultivated with extraordinary care, planted with herbs or fruits for food, or laid out for pleasure.

The CENTURY DICTIONARY, 1899, defines it as follows:

> A plot of ground devoted to the cultivation of culinary vegetables, fruits or flowering and ornamental plants.

F
It also defines "garden husbandry" as follows:

> The careful cultivation of land for profit, according to the methods pursued by gardeners, so as to secure the largest possible production.

The OXFORD DICTIONARY defines the word "garden" as follows:

> An enclosed piece of ground devoted to the cultivation of flowers, fruit, or
G
> vegetables; often preceded by some defining word, as flower, fruit, kitchen, market, strawberry-garden, etc.

Hop-lands were, and are, farmlands, and not gardens. Their only common measure with nurseries and gardens was their original profit-making character. Their bearing on the word "garden," however, is
H
best considered after looking at the earlier form of the rule.

I now turn to the historical side. We were told by counsel for the Inland Revenue that r. 8 was first introduced in the 1842 Act. That is not so. The five schedules, A, B, C, D and E, were first introduced by the Income Tax Act, 1803, very much in their present form. Sched. B, however, did not then contain the equivalent of the present

r. 8. Addington's Act, passed in 1806, re-enacted the five schedules (with some changes), and the substance of r. 8 was then introduced by sect. 75, which dealt with the operation of Sched. B under the two "numbers," No. VII, the ordinary rule of annual value, and No. VIII, the special rule about nurseries, gardens and hop-lands, which was worded as follows:

> Lands occupied as nurseries or gardens for the sale of the produce, and lands occupied for the growth of hops, shall be charged to the duties in Sched. B on the profits of one year, on an average of the 3 preceding years, except where the lands so occupied for the growth of hops shall be part of a farm held under one demise, or by the same person as owner, and shall not exceed one-tenth part of such farm, in which case the duty thereon under this schedule shall be charged, together in one sum as for a farm, by the said general rule in Sched. A mentioned.

The 1806 Act having lapsed after the peace which followed Waterloo, the 1842 Act re-enacted it substantially, including Sched. B, No. VIII, but with one difference, in that the measure of the profits was to be in accordance with Sched. D, which included the basis of the average of the 3 preceding years (Case I, r. 1):

> The profits arising from lands occupied as nurseries or gardens for the sale of the produce, and lands occupied for the growth of hops, shall be estimated according to the rules contained in Sched. D, and the duty shall be charged at the rate contained in the said Schedule; and when the said duty shall have been so ascertained, the same shall be charged under Sched. B as profits arising from the occupation of lands, except . . .

Then the exception in regard to hop-lands of the 1806 Act was repeated. It will be noticed that the 1806 paragraph said that the lands occupied should be *charged* on the profits, whereas in the 1842 paragraph it sufficed to say that the profits should be *estimated*, etc., as the lands had already been charged by sect. 63 and Sched. B itself. The words in both—namely, "lands occupied as nurseries or gardens"—are the same as in the Income Tax Act, 1918, Sched. B, r. 8, but, whilst those two subjects are associated together, hop-lands were in 1806 and 1842 added as a wholly separate subject, prefaced by "and." All hop-lands were put back into the general category of Sched. B by the Income Tax Act, 1853, s. 39, and the excepting provision ceased to operate. The bracketed words of r. 8 to-day—namely, "other than lands used for the growth of hops"—were presumably added in 1918 only to prevent doubt arising from the repeal of the 1853 Act. Thus, to infer on an *ejusdem generis* principle from the grammatical effect of the words "other than" in the present r. 8 that, because the "lands" where hops are grown are usually fields lying here and there within a farm, therefore nurseries and gardens may also consist of such scattered fields would be a false construction.

One might have expected help towards understanding the word "garden" from the facts of the reported cases, all being since the House of Lords decision in 1932 in *Monro* v. *Bailey* (1), but the difficulty in extracting help from them is, first, that the different tribunals of fact seem to me to have had in mind, consciously or unconsciously, wholly different and in some ways almost opposite conceptions of what the word "garden" in the rule really means, and, secondly, that the judgments contain no definition of it. In view of the degree of doubt thus attaching to the word, I have tried to learn historically what type of gardens were earning such profits in 1806 as to make their retention A under the general rule of Sched. B appear wasteful to a Chancellor of the Exchequer in need of revenue to fight Napoleon. In short, I have looked for the mischief or defect in the old law for which the new law of 1806 was to provide, for I think that the aid to interpretation of looking back in history to ascertain the mischief at which the statutory B provision was originally directed, particularly if the provision has been re-enacted in a series of statutes in *pari materia*, may properly be applied here, as it was by SIR NATHANIEL LINDLEY, M.R., in *Re Mayfair Property Co., Bartlett* v. *Mayfair Property Co.* (5), at p. 35, and by LORD ATKIN to an income tax question in *Birmingham Corpn.* v. *Barnes* (6). There was C published in London in 1798 a most interesting book, MIDDLETON'S AGRICULTURAL SURVEY OF MIDDLESEX. It was still a standard work in 1843, when KNIGHT'S LONDON, Vol. III, was published, containing his account of Covent Garden and the sources of supply for London's fruit, flowers and vegetables. He cited Middleton's facts and figures D largely. The following excerpts from Middleton's book give a good idea of the market-gardens round London at the very end of the eighteenth century. He says, at p. 48:

> Size of Farms. The farms of this county are in general small. Near great towns, small farms of good land are so much better suited to the purpose of a gardener than a husbandman (his art being more beneficial to the public, to his E landlord, and to his family), that the gardener should in such situations have the preference.

Later he says, at p. 51:

> Character of the Farmers. In the vicinity of London the ground is mostly rented by gardeners and nurserymen.

F Then in Chapter IX he begins as follows:

> Gardens and Orchards. Section 1. Fruit Gardens. From Kensington, through Hammersmith, Chiswick, Brentford, Isleworth and Twickenham, the land on both sides of the road for 7 miles in length, or a distance of 10 miles from market, may be denominated a great fruit garden, north of the Thames, for the supply of London. . . . The fruit gardeners have what they call *upper and under crop* growing on the same ground at one time.

G Later again, he says, at p. 256:

> I suppose there are upwards of 3,000 acres of land under this most excellent and valuable management. The quantity of productive labour depending on these gardens is surprising. Estimating their produce in money it cannot be less than £100 per acre, or £300,000 per annum.

He continues, at pp. 261, 262:

> H Observations on the gardens at the Neat Houses lying between Westminster and Chelsea . . . This land has been as long, or perhaps longer, in the occupation of kitchen-gardeners, than any other land in Britain.

Then he says, at p. 264:

> The very great expenses, in labour, manure, etc., which kitchen-gardeners are at, is evident to everyone who lives in the neighbourhood of them. Probably their expenses may be thus divided—namely, in labour, £35; teams and dung, £25;

rent, taxes and tithes, £12; marketing and expenses, £8; together £80, which, taken from the foregoing sum of £200, leaves £120 per acre as interest on capital and profit. The farming gardeners, or those who work their soil principally with the plough, are situated rather more distant from London; occupy larger tracts of land.

Again he says, at p. 266:

> I think there are about 8,000 acres in four counties cultivated in this manner [by farming gardeners], producing per acre about 50 lbs. A

Middleton recapitulated acreages and values of produce of the vegetable gardens wholly cultivated by the spade thus, at p. 267:

> 200 acres at the Neat Houses at £200 per acre; on the Surrey side of the Thames 500 acres at £150; round the outskirts of London 1,300 acres at £100, making in all 2,000 acres at an average output of £122 10*s*. per acre, or £245,000 in all. B

To these he added, first, his "farming gardeners" (their land cultivated partly by the spade, but mostly by the plough)—8,000 acres at £50 per acre—say, £400,000, and then his fruit gardens, whose produce he put at another £400,000, making £1,045,000 in all. He then made this comment, at p. 267: C

> I think these several estimates cannot be too high for the produce raised by the labour of the kitchen-gardeners round London, as they are known to live, and provide as well for their families, on five acres of the best ground, nine acres of the second best, or twenty acres of an inferior soil, as the generality of farmers can on 150 or 200 acres. This cannot fail of placing *the gardener's art* in the most favourable point of view, as no other application of land, or of labour, does, or can supply, so large a surplus revenue towards supporting the non-productive part of the community. D

Later he says, at p. 269:

> Section III. Nursery Grounds. At Chelsea, Brompton, Kensington, Hackney, Dalston, Bow and Mile End much ground is occupied by nursery-men, who spare no expense in cultivating the choicest sort, and the greatest variety, of fruit-trees and ornamental shrubs and flowers, from every quarter of the globe; and which they cultivate to a high degree of perfection. E

Lastly, he says, at p. 272:

> It is supposed there are about 1,500 acres of nursery ground in this county; and that including the hot-houses and green-houses belonging to them, they produce nearly £70 [out of] each [acre] or £100,000 a year. F

Then KNIGHT'S LONDON, Vol. III, 1843, has this passage in Chapter CIX on Covent Garden. It says, at p. 140:

> Since Middleton's work was published the population of the metropolis has just doubled, and it probably will not be far wrong to double his estimates; the mode of cultivation and of preparing the produce for market remains much in the same state as it was fifty years ago. G

One distinction between gardener and farmer in Middleton's mind seems to have been the greater intensity of cultivation in the garden, achieved no doubt in part by the closer attention to the needs of the individual plant, rendered possible by hand-cultivation as distinguished from horse-cultivation. I wonder what he would have said about the mechanical methods of farming to-day as applied to vegetable growing. H

The facts stated by Middleton must have been well-known to the government of 1806, and the profits made would naturally attract fiscal attention. I think that it is a reasonable inference that No. VIII of the Act of 1806 was directed to that "mischief," and that the inclusion of it in the Act was due to the realisation by the government and Parliament that a particular class of cultivator, observable widely in the gardens round London, was getting off too lightly compared with the professional and trade or business taxpayer. If this presumption be justified, it affords material guidance in interpreting and resolving any ambiguity in the undefined words: "nurseries or gardens for the sale of produce." The line of demarcation intended to be drawn between the nursery or garden, on the one hand, and the farmer, on the other, may in the concrete case be difficult to draw, and, where there is some evidence on each side, the question must be one of degree, and, therefore, of fact, for the commissioners, as was said in *Monro's* case (1) by Romer, L.J., in the Court of Appeal and by Viscount Buckmaster in the House of Lords. The descriptions of nurseries and market-gardens contained in the above passages from Middleton's work seem to me illuminating, however, because they help towards a fair understanding of the words "nursery" and "garden" in the 1806 Act, and tend to show that the "nursery or garden" there intended was as definite a unit of cultivable area and business as was the area meant by the word "farm." Had it been intended to tax the farmer on profits made by the growing of fruit or vegetables not in a definite "garden," and not as a separate business, but on fields or in orchards of the farm itself, and in spite of the management, cultivation, labour, expenses and receipts forming an integral part of his business of farming, other and clearer provisions would have been inserted in the Act. It would have been so simple, for instance, to add a proviso that: "Where table or culinary fruit or vegetables are grown for sale on a farm for the purpose of the farmer's business, those parts of the farm shall be deemed to be a 'garden,' and the profits thereof shall be estimated as provided in this Number." Nursery stuff such as flowers, bulbs, flowering plants and so on, could have been treated analagously under the word "Nursery." There is no hint in No. VIII that the profit from growing fruit or vegetables on a farm was to be "charged" on the farmer, and, if this interpretation of the Act of 1806 is right, I see no such difference of language in the 1842 Act, or in the 1918 Act, as would justify a new and different interpretation of the word "garden."

It is perhaps important to repeat that No. VIII did not transfer the profits of a garden to Sched. D so as to charge the recipient of the income under that schedule. It was not so transferred any more than the properties enumerated in Rules (1), (2) and (3) of No. III of Sched. A of the Acts of 1842 and 1918 (quarries, mines, ironworks, etc.) were transferred by r. (8) of No. III: *Coltness Iron Co.* v. *Black* (7), overruling *Knowles* v. *McAdam* (8), *Wakefield Rural Council* v. *Hall* (9), *per* Hamilton, J., at p. 275, and the notes in Dowell on Income Tax, 9th Edn., pp. 357-360. Sched. D was brought into No. VIII only in

order to facilitate the ascertainment of quantum. It was for "estimation," and not for "charge." It was still the "occupation" of the land which was taxed, and taxed under Sched. B. In *Back* v. *Daniels* (3), the whole dispute was whether the Daniels could be taxed under Sched. D on the profits from potato-growing on certain land of which they had the temporary use for 14 months, and, therefore, the occupation under A
r. 2 of No. VII of Sched. A, on the ground that they were carrying on a business separate from the occupation of the land. It was decided that, as they were occupiers, they could only be charged under Sched. B.

Where, from the point of view of the activity conducted or the art applied, the line of distinction between farming and gardening should B
be drawn in any particular case must, no doubt, whatever the definition of the word "garden," remain a question of degree, and, therefore, of fact, for the commissioners, but I cannot help thinking that the distinction which Middleton drew between (i) "gardeners" and (ii) "farmers who garden," as described by him in the citations I have C
read, throws a good deal of light on the line of demarcation intended by the restricted and definite language of Sched. B, No. VIII, of 1806, and that his "farming gardeners," for instance, who produced only £50 per acre, would not in 1807 have been held to be occupiers of gardens, but would have been held to be still occupiers of farms, in spite of their D
growing a proportion of vegetable crops, although I recognise that in the penumbra between the farmer who gardens as well as farms and the gardener who also farms must lie an area of pure fact for decision by the commissioners.

If my reasoning about the interpretation of the word "garden" is E
well-founded, it supports very strongly my previous conclusions, which I have endeavoured to explain, and which I venture to summarise thus: (1) The statutory "garden" must be, within reasonable limits, a defined unit of occupation in relation to space, and also time, for it must have some degree of permanence and continuity, so as to permit, F
in the normal case, of the gardening profits of the year of assessment being measured by gardening profits of the preceding 3 years, as it used to be, or one year, as it is now (except where a permanent garden has begun so recently as to make the year of assessment the measure under the Act). (2) The "splitting" of a farm into two separate units of the G
kind indicated in (1) is legitimate only if such a division is present in fact. (3) A finding that a farm is "worked as a single mixed unit" *prima facie* means that it is one in management, cultivation, labour, business accounting and so on, and, therefore, that it *is* a single farming unit, and, if so, that fact must necessarily exclude the possibility of H
"splitting." (4) If any given unit of occupation is worked in part as a farm and in part as a garden, but is not susceptible of splitting within conclusion (2), it must be held to be either wholly a farm, or wholly a garden, and it cannot be held to be a garden unless gardening is the dominant purpose of the whole, and such a conclusion is not

legitimate, unless the farming part is found as a fact to be truly a necessity of and for the garden, as it was in *Monro's* case (1). (5) However, odd fields, or fields scattered over a farm amongst what are plainly farm fields, cannot be added up arithmetically into a "garden," whatever crops they carry, either for the purpose of splitting or for the purpose of conclusion (4). In other words, such arable fields in a farm, being usually subject to rotation, sometimes bearing vegetables or fruit crops of kinds which may also regularly be seen growing in market gardens, do not constitute a unit "occupied as a garden," and have no such permanence of "garden" occupation as the Acts of 1806, 1842, 1918, and 1926 must have contemplated as essential when they required the profits to be estimated on the preceding 3 years or one year.

Since *Monro's* case (1), so far as I know, there have been only four cases reported under r. 8. In the last two, *Kerr* v. *Davis* (12) and *Williams* v. *Rowe* (13), the commissioners decided that there was no garden, and LAWRENCE, J., dismissed the appeal. Of the other two, one was English and the other Scottish. Neither is binding on us, and neither affords material assistance in the solution of the legal problem of the present case, but I think that they both illustrate the need of judicial guidance on the interpretation of r. 8. In the English case, *Dennis* v. *Hick* (10), the general commissioners found that the whole area of 350 acres, in Bedfordshire, was occupied as a garden, and FINLAY, J., (as he then was), came to the conclusion, though not entirely without hesitation, that he could not interfere. From him there was no appeal. Of the 350 acres in the year of assessment, 80 acres were pasture, 7 acres were fallow, and 263 acres carried crops. Of the 263 acres, 51 acres were hired for the season of 12 to 14 months, on temporary agreements, but the tenant was occupier within *Back* v. *Daniels* (3). On the 51 acres, he was growing brussels sprouts. On the rest of the 263 acres—namely, 212 acres—there were various vegetable crops, but potatoes accounted for 115 acres, beans for 26 acres, parsnips for 12 acres, and mangolds for 2 acres, making 155 acres in all. He also grew 52 acres of other vegetables, including 14 acres of cabbages. There were 7 horses, 32 cattle, 49 pigs and 100 poultry. The different fields carried different crops each year, though it would appear that the rules of agricultural rotation were not strictly followed. There was nothing in the method of cultivation which was peculiarly characteristic of gardening. Ordinary agricultural labour was employed, but it was found that the total labour cost per annum was £12 per acre, as against an average farm cost in the locality of £2 10*s*. The pasture was used for grazing the horses and stock, which in turn produced £300 worth of manure for use on the land. The most important feature of all was the admission of the appellant that he did in fact carry on the business of market-gardening. The commissioners held that the 263 acres were cultivated as a garden, that the appellant's farming operations were ancillary to the business of market-gardening, and that the whole 350 acres of the land in the appellant's occupation was in fact mainly devoted to market-gardening. They accordingly dismissed the appeal. FINLAY, J. (as he then was), came to the conclusion, not without hesitation, that he could not interfere. The judgments of the Court of Appeal in *Monro & Cobley* v. *Bailey* (1) had been cited to the commissioners, and, between their decision and the hearing before the judge, the Court of Appeal decision A had been affirmed in the House of Lords. FINLAY, J., says of the 263 acres, at p. 226:

> I cannot doubt that . . . it was open to any commissioner to find that that part at least was occupied as a garden . . .

He recognises, however, the distinction from *Monro's* case (1), in that B there was the stock farm with its 80 acres of pasture land (in the report in 19 Tax Cases, at p. 228, l. 9, the word "arable" is a misprint for "pasture"), and, whilst saying that that too was a question of fact, he did make the important comment, at p. 228, about "splitting" which LAWRENCE, J., cited with approval in the present case [at p. 262]: C

> It may be that in some cases the proper course is to split up the thing and to say: "Well, these are two quite distinct things, you occupy part of your land as a garden, and you occupy another part of your land as a farm, you have to be separately assessed in respect of these two things."

In view of the finding that the rest of the land was "ancillary" to the D garden, he dismissed the appeal. I cannot help thinking that, if FINLAY, J., had not felt bound by the commissioners' view that the 155 acres were under market-garden crops, he would have decided the other way, and, to my mind, there was no evidence to justify that view of the commissioners. All the crops grown on the 155 acres were of E sorts which everybody has seen commonly grown on farms all over the country where the soil is suitable—especially potatoes, which seems to have been regarded by the Revenue in *Back* v. *Daniels* (3) as a farm crop. Beans also are very familiar as a farm crop, especially to those who hunt and have to keep off them if possible. Even cabbages are common, F especially on farms carrying stock which will consume any waste or unsold surplus. I cannot understand the appellant's admission that the 80 acres of pasture which carried his stock were "ancillary" to the market-garden. Whether the 100 acres carrying other kinds of vegetables could have been "split" off into a unit which could properly be G regarded as a garden one cannot tell from the report. In the result, I cannot see that that decision affords any direct guidance for the present case.

In *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (11), a Scottish case, the findings of fact were these. The appellants had 378 acres at R., H 77 acres at E.L., and 21 acres at N. The appellants' managing director was president of the Edinburgh Market Gardeners' Association. All the holdings were managed and worked as one whole. The 280 acres were held on terms which bound the appellants generally to the most approved rules of good husbandry, and especially to put the whole under particular crops—one-quarter of it under turnips, potatoes or "other drilled green crops," one-half under grain, and one-quarter under hay or grass. The commissioners found as a fact that 170 acres were under farm crops (in which they included—rightly, as I think—55 acres of late potatoes), and that the remaining 110 acres were under various "drilled green crops." The whole of the 98 acres (77 acres plus 21 acres) was under peas, beet, savoys, sprouts, parsley, onions, leeks, broccoli, lettuce and early potatoes. There was a definite annual rotation, and the vegetable crops were not confined to any one part of the land. There were kept 9 horses, 100 cattle, and 1,200 pigs and poultry. Ordinary (meaning, I think, agricultural) methods of cultivation were followed in all three holdings. Average wages were £10 per acre. The commissioners by a majority held that the holdings of 77 acres and 21 acres, and 110 acres of the 280 acres, were "used as a garden," but that the remaining 170 acres at R. were "used for ordinary farming purposes," and they divided the assessments accordingly. That is to say, they split them. The Lord President, speaking of the 77 acres and the 21 acres, said, at p. 604, that counsel for the appellants admitted that, if using the land for the vegetables in question could be using it as a garden, then the 77 acres and the 21 acres might properly be assessed as garden. He then held that growing vegetables for human consumption was using the land as a garden, and accordingly held that the commissioners had evidence to justify their finding as to the 98 acres, and that the 110 acres out of the 280 acres at R. were on the same footing. He also pointed out that counsel made no objection to such a splitting. The division of the R. holding of 280 acres into two categories by adding up the fields which happened to carry vegetable crops and calling that part a garden would not, in my respectful opinion, have been right, had the court been deciding the question. However, as they were merely acting on counsel's admission, they were not giving any decision of their own. I find it difficult to treat the case as an authority on any of the questions which we have to decide, but the court seems to me, if I may say so, to have come perilously near to expressing the opinion, that, wherever "vegetables" for human consumption are grown, the land must in law be regarded as being "occupied as a garden."

It is interesting to compare those conclusions of the commissioners and the judges of the Court of Session with those reached by the commissioners and LAWRENCE, J., in the two recent cases I have already cited of *Kerr* v. *Davis* (12) and *Williams* v. *Rowe* (13). The contrast affords a striking illustration of the contradictory views entertained by commissioners, not only on what are garden crops and what are farm crops, but also on the cost of cultivation as indicating the character of the occupation.

In the present case, LAWRENCE, J., on the question of "splitting" preferred the *dictum* of FINLAY, J., in *Dennis* v. *Hick* (10) to the solution accepted by the Court of Session in *David Lowe & Sons, Ltd.* v. *Inland*

Revenue Comrs. (11), and was evidently inclined to allow the appeal, but felt bound by the decision of the House of Lords in *Monro's* case (1) to decide as he did. In my humble opinion, there is nothing in the decision in *Monro's* case (1) to prevent either him or this court from allowing this appeal.

There are two main questions of law for decision—namely, (i) whether A or not there was any evidence of the 229 acres of arable land, or any part thereof, being occupied as a garden, to which my answer is that there was not, and (ii) whether or not, even if distinctively garden crops were in the year of assessment grown on some of the fields, those fields were so situate as to be capable of being "split" from the farm so as B to constitute a garden unit of occupation, having regard to the absence of either finding or evidence of any local separation between them and the rest of the farm, or of those fields carrying garden crops permanently, or even of their having carried them in the preceding year. Again my answer is that they were not. Besides these two main questions, C there are the various other legal aspects of the meaning of r. 8 which I have already discussed but need not repeat, and on which, I think, the commissioners have misdirected themselves in law. However, they are really covered by the two main questions. I am of opinion that the appeal should be allowed, but my colleagues, whose judgments I D have had the advantage of reading, are in agreement that the appeal should be dismissed, and dismissed it will be.

CLAUSON, L.J.: The taxpayer in this case occupies an area of 553 acres, and has been assessed for the year ending Apr. 5, 1937, (*a*) in E respect of profits from 238 acres (being arable), part of the 553 acres, occupied as nurseries or gardens for the sale of produce, in the sum of £2,000, and (*b*) in respect of the occupation of the remaining 315 acres, in the sum of £495. The figures of acreage which I mention are taken from the assessment. The £2,000 was an estimated figure of profit, F which would admittedly require adjustment so as to represent the profits arising from the occupation of the 238 acres during the period from Apr. 5, 1935, to Apr. 5, 1936. The £495 is the admitted annual value of the 315 acres in the year ending Apr. 5, 1937. The assessment is based on the following propositions: (i) that part of the 553 acres, G consisting of the 238 acres, is occupied as nurseries or gardens for the sale of the produce other than lands used for the growth of hops, and that, accordingly, in respect of these 238 acres, the tax payable under Sched. B in respect of profits arising from the occupation of these 238 acres is (under Sched. B, r. 8) to be estimated according to the provisions H and rules applicable to Sched. D, that is, by reference to the profits of the year preceding the year of assessment (see the Finance Act, 1926, s. 29); (ii) that the remainder of the 553 acres, consisting of 315 acres, is not occupied as nurseries or gardens for the sale of the produce (apart from the portion used for hops), and accordingly is not within Sched. B.

r. 8, and, being occupied for the purpose of husbandry only, falls to be assessed under the general provisions of Sched. B by reference to the annual value.

When the matter came before the general commissioners, the taxpayer raised a technical objection that the assessments were bad for insuffi-
A ciently identifying the subjects of the respective assessments, and also raised the substantial objection that no part of the 553 acres was occupied as a garden for the sale of the produce. He contended that the whole of the 553 acres should be assessed by reference to the annual value as being occupied for the purpose of husbandry only. The general com-
B missioners rejected the taxpayer's technical objection, and held that the assessments sufficiently described the lands comprised therein. They also decided that the 553 acres could properly be divided for the purposes of assessment under Sched. B, and confirmed the assessments, subject to the token figure of £2,000 being adjusted so as to represent the true
C figure of profit.

The general commissioners found the following facts: (i) that the farming operations on the arable land (apart from that used for the growth of hops) are ancillary to the market garden operations; (ii) that the whole of the arable land (apart from that occupied for the growth
D of hops) is occupied as gardens for the sale of produce; (iii) that the remainder of the land occupied by the appellant is devoted to farming operations, and is assessable under the ordinary rules applicable to Sched. B.

A case was then stated at the taxpayer's instance. From the stated
E case, it appears that before the commissioners it was proved or admitted (*a*) that the whole of the 553 acres was worked as a single mixed farm in one unit, and (*b*) that wheat was grown in the year in question upon 16 acres of the arable land, one purpose of its being grown being to provide straw litter for the pigs kept on the non-arable land, and that
F mangolds, parsnips and lucerne were grown on the arable land to provide feed for the stock (90 cattle, 232 sheep and 1,012 pigs) and the 16 horses kept on the non-arable land. The case stated came up for consideration before LAWRENCE, J., who made an order on May 26, 1939, which, as drawn up, is as follows:

G

> The court is of opinion that the determination of the commissioners is correct except so far as they held that part of the arable land is ancillary to the gardens, and dismissing this appeal the court remits the matter to the commissioners to be dealt with in the light of the order of this court.

As I read this order, the effect is that the commissioners are directed
H to amend the assessments by taking out of the 238 acres (assessed on the profits principle) such acres as are used for farming operations as distinct from being used as "gardens for the sale of the produce," and to add them to the 315 acres assessed on the annual value—that is, occupied for the purpose of husbandry only.

I can dispose shortly of the point raised as to insufficiency of identifi-

cation. I cannot feel any doubt that the assessing authority ought to identify the subject-matter of the assessment sufficiently to enable the taxpayer to appreciate to what subject-matter it relates. It was said on behalf of the Crown that the question of the identity of the parcels in the two assessments was in fact cleared up in correspondence, and I am satisfied that, after the exhaustive discussions before the commis- A
sioners, before LAWRENCE, J., and in this court, there is no substantial doubt left as to the identity. The leading counsel for the appellants told us that he did not desire to press the point, and I think he was wise in that regard. I do not propose to refer to this point any more.

I turn now to the substantial points which arise. It appears on B
reference to the oral judgment of LAWRENCE, J., that the appellant argued before him (i) that, in view of the fact stated in the case that the whole of the 553 acres was worked as a single mixed farm in one unit, it was wrong to split the assessment of the 553 acres into two, and that the 553 acres should be assessed as a whole, and (ii) that the C
nature of the produce grown is not the sole consideration under r. 8, which deals with gardens for the sale of the produce. The judge, as I read his judgment, was of opinion that the finding that the whole acreage was worked as a single farm made it impossible to uphold an assessment upon one part as gardens for the sale of the produce, under r. 8, and D
another part as farmlands. In his view, lands to be assessed as gardens must be distinct and separable from the farm, and he thought it could not be said, on the findings before him, that the lands assessed as gardens were so separate.

However, he felt himself bound to follow the decision of the Court E
of Session in *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (11), which he regarded as a decision that the commissioners can apportion the assessment even where lands are held and worked as one unit. For myself, I have failed to extract any clear-cut principle from that decision, and, as it cannot be suggested that the decision is binding upon us, I think F
it best to consider the question as one of principle.

On the question of principle, I find myself in agreement with the views, as I understand them, expressed by FINLAY, J., in *Dennis* v. *Hick* (10), at p. 228, and, as I read his judgment, approved by LAWRENCE, J., the assessing authority, as it appears to me, must G
address to itself the following questions. First, is the occupation of the area (in the present case, the 553 acres) by the taxpayer an occupation of the whole as "gardens for the sale of the produce"? If the answer to this question is in the negative, a second question must be put—namely, is there any part, and, if so, what part, of the area which H
is occupied as gardens for the sale of the produce? If the answer to the second question is in the affirmative, r. 8 will apply to the part in regard to which the question is so answered.

In my judgment, the questions which I have formulated above are, to use the language of FINLAY, J., questions of fact and of degree. In

any particular case, the question may arise, and may have to be determined by the court, whether there was evidence to justify the answers given to the questions, but, as regards that, each case must stand by itself, and I do not see what general guidance can be given. In the particular case before this court, there is a finding of fact that the whole
A 553 acres were worked as a single mixed farm in one unit. LAWRENCE, J., but for feeling bound by *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (11), would, as I understand his oral judgment, have construed this to mean that the commissioners held that the taxpayer occupied the whole 553 acres for the purposes of one indivisible business—namely, husbandry.
B I am not surprised that he should so construe the finding, as, apart from the context, the phrase "as a single mixed farm in one unit" might well be understood to carry such an obligation. On considering the stated case as a whole, however, I cannot for myself so construe the finding. The commissioners have clearly treated the taxpayer as
C occupying the separate parts for activities which are separately assessable, and that means, as I understand it, that, notwithstanding that there may be unity of administration over the whole area, and though the labour may be used now in one part of the area and now in another, there is a portion of the area which, as a matter of business and common
D sense, is recognisably occupied as "gardens for the sale of the produce." In other words, notwithstanding their finding that the whole of the 553 acres were worked as a single mixed farm in one unit, the commissioners have addressed to themselves the right questions, and they were, as it appears to me, fully justified on the facts of the case in answering
E them on the footing that one part of the area could be properly treated as occupied as "gardens for the sale of the produce" and the remainder as occupied for ordinary husbandry.

Having dealt with the matter on the footing that he was bound to approve of the existence of two separate assessments, LAWRENCE, J.,
F came to the conclusion that there was some evidence—namely, the gardening character of most of the crops grown on the arable land—which justified the commissioners in holding the parts of the arable land occupied by those crops to be occupied as gardens for the sale of the produce. As I understand it, however, he held that the commis-
G sioners were wrong in law in treating the parts of the arable land which were under other than "gardening" crops as forming part of "gardens for the sale of the produce." On a careful consideration of the stated case, I cannot satisfy myself that LAWRENCE, J., was right in this regard. The commissioners' first finding—namely, "that the farming operations
H on the arable land (apart from that used for the growth of hops) are ancillary to the market garden operations"—must, I think, mean that they consider that the whole of that arable land—namely, the 238 acres—is occupied substantially as "gardens for the sale of the produce," notwithstanding that a small part of it in the particular year in question, about 26 acres, was cropped with other than what might be called strictly

gardening crops. This again is a question of fact and of degree, and I
am not prepared to say that their conclusion was wrong in law.

It is necessary now to deal with a question which was apparently
argued below, and was certainly argued on the Crown's behalf before
us—namely, whether or not the growth upon a particular area of ground
of such a crop as is commonly grown in "gardens for the sale of the A
produce" necessarily constitutes that area a "garden for the sale of the
produce." I agree with the opinion expressed by LAWRENCE, J., that
the mere presence of such a crop is some evidence that the area occupied
by it is a "garden for the sale of the produce," but, in my judgment, as
a matter of construction, the test laid down by the legislature for the B
application of r. 8 is not merely the presence of what I will call for short
a "gardening crop." The test is whether the locus in question is occupied
as nurseries or gardens for the sale of the produce. I have little
doubt that in 1842, or at the earlier date, if it is so, when this test was
laid down, the application of it was easy. Modern developments, due C
not only to the application of mechanical methods, but also to increased
facilities for transmission of produce, have made the application of the
test so difficult that it may well be, as was suggested in argument, that
nothing will suffice to meet the position but the interposition of the
legislature. However that may be, the test laid down in or before 1842 D
must be applied in 1939, and, in applying the test, the question to be
propounded seems to me to be whether or not the locus in question is
occupied as nurseries or gardens for the sale of the produce. While the
nature of the produce is an important factor, the test involves the due
consideration of all other factors which may throw light on the question E
whether or not, within the ordinary meaning of the English language,
the locus is occupied as nurseries or gardens for the sale of the produce.
The matter, if I may again borrow the language of FINLAY, J., is a
question of fact and degree.

While this is my view, I see no reason to doubt that in this particular F
case the commissioners have applied the right test. If I had thought
that they considered themselves bound to hold a particular area to be
a garden merely because it is cropped with garden crops, irrespective
of any other consideration, I should have been in favour of sending
the case back to them for further consideration. However, the very G
fact that in the area which they find to be "gardens for the sale of the
produce" they include an area which happens this year to be cropped
with a crop of wheat is, to my mind, sufficient indication that they took
no such narrow view. Again, the question is one of fact and degree.
It does not seem to me to be reasonable to lay down that, if a market- H
gardener happens to grow in any particular year in one portion of his
market-garden a comparatively small area of non-garden crop, that
circumstance makes it necessary as a matter of law to treat that small
area as separated for assessment purposes from the rest of the garden,
even if the area in question is so cultivated (as may quite possibly be

the case) merely as a matter of convenient rotation. For these reasons, I am of opinion that the commissioners reached a conclusion in this case which is not open to legal objection, and, for my part, I should affirm the order of LAWRENCE, J., save in so far as relates to the exception therein contained, and save in so far as it remits the matter to the A commissioners. The costs of the appeal should, in my judgment, be paid by the appellant.

GODDARD, L.J.: The appellant occupies lands in three adjoining parishes in Worcestershire, known respectively as Fingerpost Ground, B Lower Moor, Springhill and Willspit. Springhill is a holding of just over 500 acres, the other three being much smaller. The commissioners have found that these lands are all worked by the appellant as a single mixed farm in one unit. They have upheld an assessment upon him under Sched. B in respect of the lands at Fingerpost Ground, Lower C Moor, and rather less than half of Springhill under r. 8, finding that those lands, which comprise all the arable of the farm, other than that under hops, are a garden of which the produce is sold, or, as I will call it for the sake of brevity, a market-garden. The rest of the land, comprising meadow, pasture, hops and osiers, they assess under r. 1. The D principal question which arises is whether or not they are entitled so to split or apportion the assessment. If apportionment is permissible, it cannot, in my opinion, be said that there was no evidence on which they could find that the part assessed under r. 8 is a market-garden. If it is not so permissible, and the case has to be remitted for assessment E as a whole, then the commissioners must consider, as I understand the decisions, whether the holding is substantially a market-garden or an ordinary farm, and assess accordingly.

Counsel for the appellant took three points, one of which can for the moment be left over. His first point was whether or not the mere fact F that vegetables to be sold for human consumption are grown on parts of an ordinary mixed farm justifies a finding that those parts are used as a garden. His second point was whether or not it is permissible in such a case to split the assessment under Sched. B into two parts, assessing part as a garden under r. 8 and part as a farm under r. 1. The G main argument was that to do so would be inconsistent with the finding that the holding was worked as a single mixed farm in one unit. Mixed farming, as I understand what is quite a common expression, means no more than that the farmer does not confine his activities to one particular branch of agriculture. While one may carry on exclusively H dairy-farming, and another may confine himself to raising corn and ordinary rotation crops, others may combine the two. Thus, an arable farmer may grow, in addition to corn and rotation crops, vegetables and fruit intended for sale in greengrocers' shops. A farmer engaged in mixed farming may or may not keep separate accounts for each variety of farming carried on. He would naturally use the manure from his farmyard indiscriminately over so much of his holding as required it. His carters and other workpeople would be engaged in one field or another as occasion might require, and there would be one direction or management over the whole, which is what I understand by working the farm as one unit. If he were minded to grow what I may call greengrocers' stuff as well as corn, he would no doubt use the leguminous crops for rotation purposes in place of, or in addition to, swedes, mangolds, clover, sainfoin or the like. If his operations are such that it can fairly be said that he is carrying on a market-gardener's business as well as that of a farmer, I do not see that the fact that he works the two together, whether as a matter of good farming or for his own convenience, makes any difference. Whether he is carrying on a market-gardener's business, either exclusively or in addition to other business, is, in my opinion, a question of fact. I am far from saying that, because a farmer may in any year put a field under potatoes some or all of which are sold to greengrocers, that will necessarily justify a finding that he was using his land as a market-garden. It must be largely a question of degree : *Re Hammond, Ex p. Hammond* (14). There is, however, a body of authority which shows that a tribunal may regard the produce as the test to be applied in determining whether or not land is being cultivated as a garden, and this not only in connection with the Income Tax Acts. In *Purser* v. *Worthing Local Board of Health* (15), a case under the Public Health Act, the Court of Appeal held that land used for the purpose of growing fruits or vegetables for sale was a market-garden. In *Cooper* v. *Pearse* (16), the question arose under the Allotments and Cottage Gardens Compensation Act, 1887, and COLLINS, J., said, at p. 556 :

> You have a holding which may be used as a farm or a garden, and from which in the ordinary course crops or fruits may be expected—crops, I should suppose, from the farm, fruit from the garden. Taking the definition of "garden" found in a standard dictionary, it is a "piece of ground enclosed and cultivated for herbs or fruits for food, or laid out for pleasure."

In the Scottish case of *Stewart (or Watters)* v. *Hunter* (17), the question was as to the validity of a notice to quit under the Agricultural Holdings (Scotland) Act, 1923, and it had to be determined, *inter alia*, whether the holding was a market-garden. It was held it was not, but Lord President CLYDE said [p. 317] :

> "The trade or business of a market gardener is, in my opinion, the trade or business which produces the class of goods characteristic of a greengrocer's shop, and which in ordinary course reaches that shop *via* the early morning market where such goods are disposed of wholesale."

I think that *Monro & Cobley* v. *Bailey* (1) was in some respects very like the present case, except that there was no splitting of the assessment. The total acreage of the farm was 204½ acres, of which 60 acres were used for bulb and flower cultivation, 50 acres for potatoes, and 94½ acres for general farm crops, including cereals. The House of Lords held that there was evidence—which was that bulbs and flowers were grown n the holding—on which the commissioners could hold that the whole

farm was a garden within r. 8, and I may also refer to *Dennis* v. *Hick* (10),
where again a finding that the holding was a garden within r. 8 was
upheld. It is said, however, that in none of these cases was there a finding
that the holding was a mixed farm. I confess I can attribute no magic
to these words. In *Monro & Cobley* v. *Bailey* (1), the case shows that it
A was a mixed farm. I have already mentioned the various cultivations
and the respective acreages, and it is found in the case that the whole
acreage consisted of open fields worked as one farm by labourers using
ordinary methods and implements of husbandry, and, further, that the
crops were changed each year according to the usual agricultural principle
B of rotation of crops. If that is not a mixed farm, well might one ask
"What's in a name ?" I do not overlook the fact that the commissioners
in that case came to the conclusion that the main purpose of the
holding was the growth of bulbs, and that the farming operations were
ancillary to the bulb business. This word "ancillary" occurs in many
C of these cases, though not in the judgments. From the commissioners'
findings, it is clear that what was meant in *Monro's* case (1) was that
it was the bulb-growing, and not ordinary farming, which was the
principal object for which the farm was carried on. As VISCOUNT
BUCKMASTER put it, at p. 474, it "is a matter of degree." With this
D case before me, I do not feel able to say that, if the commissioners had
assessed the appellant's lands as a whole, we could have interfered with
the decision, whether they had assessed them as a farm under r. 1, or as a
garden under r. 8. To do so would, I think, be directly contrary to the
decision of the House of Lords.

E I now deal, therefore, with what I have already said is the main
question—namely, whether or not the assessment can be split or apportioned.
What the commissioners have done here, as I read their findings,
is this. They have in effect taken the plan of the appellant's holding
and put a blue pencil round the arable, excluding the hops, and said :
F "We find the land inside the blue line is in substance a market-garden."
True it is that, on some of that land, farm and not garden crops are
grown, but the principal object of the cultivation is the raising of greengrocer's
stuff, and that part which is used for straw crops or mangolds
is only a subsidiary matter, or, if you like, ancillary to that main purpose,
G in that it enables manure to be produced which can be used on
the garden land. The lands outside the blue line are entirely different.
They consist of hop lands, which by statute cannot be treated as garden,
and pasture, meadow and osiers, which no one could consider to be a
market-garden. Thus, we find that the taxpayer has in effect two classes
H of lands : one is in substance a market-garden, assessable under r. 8,
the other farmlands assessable under r. 1." I confess that I can find
nothing in the Act which prevents this being done, and the result seems
to be fair both to the taxpayer and to the Revenue. By this method,
the former does not escape taxation under the rules of Sched. D on that
part which he cultivates as a garden, while he gets the advantage of

having what I may call ordinary agricultural land kept within the general provisions of Sched. B. This principle of splitting up the assessment was adopted in *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (11) in the Court of Session, where again the facts would amply justify the holding being described as a mixed farm. That case would perhaps have been of greater assistance had counsel not admitted that it was open to the commissioners to split the assessments. However, none of their Lordships seems to have had any doubt that it could be done. Like them, I can find nothing in the rules which prohibits this course, and, indeed, it appears to me that in certain cases they directly contemplate, and to some extent actually require, a division of the taxpayer's lands for the purpose of Sched. B. A dwelling-house and a warehouse or trade premises have to be taken out. Then the taxpayer has an option to have his farmlands, or woodlands if managed on a commercial basis, assessed under Sched. D. Thus, it is possible for the owner of an estate consisting of a mansion, a park, home farm and woodlands to have different assessments, differently calculated, made on him, which can be done only by a method of apportionment.

I may point out that, as I understand *Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (11), the commissioners actually apportioned or split up the assessments on the various arable holdings, so that those on which ordinary farm crops were grown were assessed under the rules of Sched. B, while those on which vegetable crops were grown fell under the rules of Sched. D. In such a case, I can, with Lord Fleming, well imagine that great administrative difficulties may arise because the vegetable crops appear to have been used, in part at least, as rotation crops for the corn land, so that in one year a particular field may be under corn while in the next year it may be under brussels sprouts. This aspect may well demand the attention of Parliament. In the present case, however, no such difficulty arises, because a clean cut has been made between the arable lands and the rest of the lands.

In the court below, Lawrence, J., following the decision of the Court of Session, held that apportionment was permissible, but he remitted the case to the commissioners to deal again with that part of the arable land which they held was ancillary to the market-garden. He gave no direction as to how they were to deal with this portion, but I gather he thought that less of the arable should have been apportioned to the garden assessment. I cannot agree to this course, and do not think the case should be remitted. The commissioners have distinctly held that all the arable is a market-garden, and, for the reasons given above, there was, in my opinion, evidence on which they could so find. The finding that some portion, which I assume was that part not under vegetable crops, was ancillary to the market-garden means, I think, no more than that the main purpose of the arable cultivation was gardening, and not farm crops, and that, if a market-gardener grows some crops useful for the production of manure, as all straw crops are, they can be regarded as ancillary to the main operation. However, there was exactly the same finding in *Monro & Cobley* v. *Bailey* (1), a case which, considering that only 60 acres out of 204 acres were under a garden crop, may be considered stronger in favour of the taxpayer than the present. Yet this did not avail to upset a finding that the whole farm was a garden. With all respect to the judge, in view of the finding that the whole of the arable land was a garden, I do not think that the case can be remitted on the ground suggested without disregarding the decision of the final Court of Appeal. It is true that, for some reason which was not explained, the Crown has not entered a cross-appeal against this part of the order, but this court must make such order as it deems the court below ought to have made, and, in my opinion, the proper order would have been simply to confirm the assessments appealed against.

It remains only to say a word on the third point taken by counsel for the appellant—namely, that the assessment must identify the particular lands which come under each category, I suppose by reference to the ordnance survey numbers. As all the arable land other than hop-land has been included in the garden assessment, there is nothing in this point, so far as the particular assessments in this case are concerned, nor do I find anything in the Act which would make the assessment bad if the apportioned assessments stated only the acreage, and not the actual fields. It is desirable, however, that every information should be given to the taxpayer, as has been done in this case, as to which lands are claimed by the Revenue authorities to come under r. 8, so that he and his advisers may have proper material upon which to decide whether or not to appeal. I think that this appeal should be dismissed, and I concur with the order proposed by CLAUSON, L.J.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn*, agents for *Ryland, Martineau & Co.*, Birmingham (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BUTLER *v.* STANDARD TELEPHONES AND CABLES, LTD. McCARTHY *v.* STANDARD TELEPHONES AND CABLES, LTD.

[KING'S BENCH DIVISION (Lewis, J.), **December 7, 8, 11, 13, 14, 18, 20, 1939.**]

Nuisance—Adjoining owners—Roots of trees causing damage to adjoining owners' houses—Natural user of land.

The plaintiffs were the owners of two houses adjacent to land in the occupation of the defendant company. In 1930 the defendants planted a number of Lombardy poplar trees at a distance of from 10 to 13 feet from these houses. In 1934 a serious settlement occurred in McCarthy's house from, at the time, some unascertained cause. It was attempted to remedy the difficulty by underpinning, which for a time appeared effective. In 1937 settlements occurred in the houses of both plaintiffs, and the buildings threatened to collapse. The plaintiffs claimed damages for trespass and nuisance, contending that the damage was the result of the spreading of the roots of the trees, which caused the sub-soil to lose moisture and that the foundations were damaged by the roots. The defendants contended that the facts, if proved, showed no cause of action since the planting of the trees was a natural user of the land :— A

HELD : the action was well-founded in law, and the plaintiffs were entitled to recover.

[**EDITORIAL NOTE.** There appears to be no previous English decision on nuisance by the spreading of the roots of trees beyond the boundary of the owner's land. It was strenuously argued in the present case that, the spreading of the roots being a matter of which the owner would have no knowledge, and the planting B of trees being a natural user of the land, no action would lie for any damage so caused. This argument has, however, been rejected, and the owner has been held liable to his neighbour in damages. The neighbour, of course, also has the remedy of abating the nuisance, i.e., of cutting the roots.

AS TO LIABILITY FOR NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 83-85, paras. 147, 148 ; and FOR CASES, see DIGEST, Vol. 2, pp. 63-66, Nos. 397-418.] C

Cases referred to :

(1) *Middleton* v. *Humphries* (1913), 47 I.L.T. 160 ; 36 Digest 224, case *656i*.
(2) *Smith* v. *Giddy*, [1904] 2 K.B. 448 ; 2 Digest 64, *407* ; 73 L.J.K.B. 894 ; 91 L.T. 296.
(3) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5 ; 2 Digest 65, *412* ; 48 L.J.Q.B. 109 ; 39 L.T. 355. D
(4) *Lemmon* v. *Webb*, [1894] 3 Ch. 1 ; 2 Digest 64, *405* ; 63 L.J.Ch. 570 ; 70 L.T. 712 ; *affd.*, [1895] A.C. 1.
(5) *Noble* v. *Harrison*, [1926] 2 K.B. 332 ; 36 Digest 189, *316* ; 95 L.J.K.B. 813 ; 135 L.T. 325.
(6) *Barker* v. *Herbert*, [1911] 2 K.B. 633 ; 36 Digest 197, *374* ; 80 L.J.K.B. 1329 ; 105 L.T. 349. E
(7) *Blake* v. *Woolf*, [1898] 2 Q.B. 426 ; 36 Digest 196, *369* ; 67 L.J.Q.B. 813 ; 79 L.T. 188.
(8) *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341 ; 36 Digest 214, *575* ; 93 L.J.K.B. 261 ; 130 L.T. 522.

F

CONSOLIDATED ACTIONS for damages for nuisance, trespass by the wrongful interference by trees, the property of the defendants, with the support of the plaintiffs' premises, or, alternatively for negligence or, alternatively for the wrongful removal of water from the plaintiff's land. The plaintiffs also asked for an order that the defendants should cut down G the trees, and for an injunction restraining the defendants from permitting the roots of their trees from entering upon the plaintiffs' land. The facts are fully set out in the judgment.

R. E. Manningham-Buller and *J. C. Lawrence* for the plaintiffs.

Cecil R. Havers, K.C., and *Malcolm McGougan* for the defendants. H

Havers, K.C. : No action will lie even if the plaintiffs succeed on the facts. The defendants are not liable for damage caused by the natural user of their land. Trees are not in themselves dangerous things : *Noble* v. *Harrison* (5). It must be shown that the defendants knew of the harm they are alleged to have done : *Barker* v. *Herbert* (6). [Counsel also referred to *Blake* v. *Woolf* (7) and *Job Edwards, Ltd.* v. *Birmingham Navigations* (8).]

Manningham-Buller : An action will lie for overhanging branches of a
A tree which cause damage to the plaintiffs' land : *Smith* v. *Giddy* (2), *Crowhurst* v. *Amersham Burial Board* (3) and *Lemmon* v. *Webb* (4). An action will similarly lie for damage done by the roots of trees : *Middleton* v. *Humphries* (1) and *Lemmon* v. *Webb* (4).

B LEWIS, J. : The defendants are the owners and occupiers of a sports ground at Eltham. On the west side of the sports ground lies a road known as Green Lane, and between Green Lane and the sports ground there are numerous semi-detached houses. The means of access to the sports ground from Green Lane is an entrance way which has been
C referred to during the case as " The Avenue." It is a piece of ground some 40 ft. wide and some 100 ft. or more long. The exact measurement of its length I have not got, but, speaking from recollection of the premises, which I went to inspect at the invitation of the parties, I think that it is a distance of 100 ft. or more from Green Lane to the sports ground.
D That avenue is fenced on the north side and south side with a wooden fence. To the north of the fence on the north side of that avenue there is a semi-detached house belonging to the plaintiff McCarthy. On the south side of the fence on the south side of the Avenue is the house No. 85, which belongs to the plaintiff Butler.

E In 1928, McCarthy purchased the house No. 83, which is attached to No. 81, Nos. 81 and 83 being a pair. When he bought the plot of land on which the house now stands, the actual building operations had not begun, but the foundations had been marked out. He went into possession in 1928, and he had not been in the house more than a very short time when
F he had trouble with the south wall of the house, which is the flank wall. The house faces east and west, and the flank wall is the south wall. He had trouble with that wall because the wall became damp. That was due to the fact that that flank wall was exposed to the weather, the prevailing wind being the south-west wind, and the rain beating on
G that wall rendered it damp because the bricks of which the wall was constructed were found to be porous. That was remedied, and there was no further trouble for some 5 or 6 years.

In the winter of 1930/31, the defendants planted two rows of Lombardy poplars some 3 ft. inside the two wooden fences. That is to say, there
H was a row on the north side of the Avenue just inside the fence and a row on the south side of the Avenue just inside the fence. Those trees were at a distance of some 10 ft. to 13 ft. from the flank wall of McCarthy's house. This wall does not lie exactly parallel to the line of the wooden fence on the north side of the Avenue, there being a greater distance from the fence to the back of the house than there is from the fence to the front of the house. Those poplar trees were planted when they were some 7 ft. or 8 ft. high and they have grown remarkably well.

Every witness who has assisted me in this case has said that the trees are extremely fine specimens of Lombardy poplars. They were planted only in 1930/31, and they are now of an average height of something over 40 ft. They are good big trees, well grown, with substantial butts.

In 1934 McCarthy found that there were signs of a very severe settlement in his house. He did not know what the cause of it was, and it was eventually decided to underpin the flank wall of his house. For that purpose there were three excavations made along that flank wall and the wall was underpinned, which apparently remedied the settlement for the time being.

When the excavations were made for the purpose of the underpinning, it was found that there were a certain number of roots from the poplar trees on the north side of the Avenue which had spread right up to, and were burrowing down below, the foundations of the wall. These roots were cut, and the underpinning was replaced. Everything appeared to be then in order. In 1937, however, the trouble again arose, and the crack and the signs of settlement which appeared in 1934 again made themselves manifest. I myself have been to visit the premises, and there is no question, and indeed there is no dispute, that McCarthy's house shows serious signs of settlement. I do not think it is necessary for me to go into the details of the various cracks which there are in the house, but the position is that the cracks which appeared in 1934 are now evident again. To some extent they are worse. One particular matter is that the roof of McCarthy's house is coming away from the chimney-breast which stands in between the two houses Nos. 81 and 83, and it is possible, and indeed quite obvious, that there is a large fissure between that chimney-breast and the roof, and the house is gradually settling down towards the south and coming away from No. 81. At the same time, there is now evident in No. 81 signs that that house—particularly with regard to the party wall between Nos. 81 and 83—is feeling the effects of the subsidence of No. 83. That is to say, there are cracks in the party wall which apparently were not there in 1934 when the first sign of damage occurred, and the position now is that McCarthy's house is falling down and to a certain extent pulling No. 81 with it. The condition of No. 81, of course, is not nearly so serious as that of No. 83.

Butler, who lives in No. 85, on the south side of the Avenue, noticed no trouble, other than the usual small cracks which frequently appear in newly-built houses, until 1937, when the trouble in McCarthy's house appeared for the second time. The condition of Butler's house, which I have also seen, is undoubtedly due to subsidence. That is to say, Butler's house is subsiding and falling slightly to the north. It is No. 87, which is the second of the two houses forming the two semi-detached houses Nos. 85 and 87 which is beginning to show signs of the settlement of Butler's house, because there again there are cracks which have appeared in the party walls, and the same thing is happening, or has happened, to No. 87 which has happened to No. 81—namely, it is feeling the pull of the subsidence of Butler's house, just as No. 81 is feeling the pull of the subsidence of McCarthy's house.

At the present moment—when I say at the present moment, I mean on the day upon which I went to visit the site—it is abundantly clear that the roots of the poplar trees are working, and have worked, below the foundations of No. 83 and No. 85. The plaintiffs say that the subsidence is due to the fact that the poplar trees, through their roots, have disintegrated the clay upon which these two house are built so as to cause the clay to shrink, and, therefore, to reduce the support of these two houses, and, that being so, they bring their action for damages against the defendants for nuisance, for trespass and for negligence.

As I have already said, I have had the assistance in this case of the evidence of experts on each side, and I need hardly say that their evidence has been of the greatest assistance to me. It is not disputed that the cause of the collapse, if I may use that expression, of McCarthy's house and Butler's house is the shrinkage of the clay below the foundations of those houses. The question which I have to decide is whether or not the plaintiffs have satisfied me that the shrinkage of that clay has been caused, as the plaintiffs allege, by the drying up of the moisture in the clay owing to the action of these Lombardy poplars.

There is one other fact which is agreed by the experts on each side, and that is that it is part of the nature of this particular variety of poplar to act as a drain. In other words, this particular variety of poplar is a shallow-rooted tree which throws out roots of a considerable length, with smaller roots and capillaries attached thereto, which capillaries seek water. A poplar tree, moreover, is a tree which may be described as a very thirsty tree, because it consumes a large amount of water, and the roots, although they are shallow and run under the surface more or less horizontally, and not vertically, as do the roots of some other trees, will go down, in spite of that fact, to find water. The plaintiffs, as I have said, say that the shrinkage of this clay is due to the thirsty nature of the poplar trees. That is to say, they allege that those poplar trees, by their roots which have acted as drains, have sucked up the water-content in the clay, with the result that the clay has shrunk and in course of time has caused both houses to subside. In answer to that, the defendants say that this shrinkage of clay—which, as I have said, is conceded—is due to what was referred to in the course of the case as natural causes. It is said (and said no doubt with a great deal of truth) that, when one has dry weather on a clay soil, when one has a drought, the water-content in the clay rises, owing to the action of the sun, and the clay is dried up. It is pointed out that on a clay soil, as, if I may say so, one's own experience tells one, in a dry season or period of drought there are cracks in the ground, and those cracks occur more frequently on a clay soil than anywhere else. That is to say, the water is being drawn out of it and the clay is becoming baked. It is said, moreover, by the defendants that it is quite obvious from the extremely good growth of these trees that this particular place, the site of Nos. 83 and 85, was a wet place, and that the poplar trees have grown as they have extremely well owing to the fact that they have a place which suits them—that is to say, there is plenty of water—and that this site was a wet site. Owing to the facts that at the end of 1933 and the beginning of 1934, before the first trouble was discovered in No. 83, there was a period of extreme drought, the first collapse in 1934, it is suggested, is attributable, not to any action of the roots of the poplar trees, but to the fact that during that period of drought the water was being extracted from the clay owing to the drought. That, it is alleged, is the real cause of this subsidence, and the poplar trees have nothing whatever to do with it. It is similarly pointed out that the second subsidence in McCarthy's house, No. 83, in 1937, and the first signs of it at the same time in Butler's house, No. 85, also followed a period of drought. Those are the contentions of the plaintiffs and the defendants respectively. The plaintiffs say that this subsidence was caused by the action of the poplar trees. Not at all, say the defendants, the poplar trees have nothing whatever to do with it, and it has occurred as a result of natural causes.

I am of opinion that the plaintiffs have satisfied me that this subsidence was due to the action of the roots of the poplar trees. As I have already said, it is conceded that the action of poplar trees is to drain the clay. Indeed, Dr. Faber, who gave evidence before me, and of whose reputation every one is cognisant, told me quite frankly that, although he formed the view that the poplar trees up till now had not caused any damage, he thought that in time, when, as he said, the roots of the trees got right down below the two houses, they very likely would cause damage. That is to say, they would cause damage from further draining of the clay soil. That perfectly frank admission, which one would expect from Dr. Faber, seems to me to point to the facts that he is acknowledging the action of the roots of the trees, and that he bases his view that these poplar trees had nothing whatever to do with the shrinkage of the clay on the fact that in 1937, in his opinion, the roots of these poplar trees had not got sufficiently far below the foundation to cause any shrinkage of clay, and that, if they had not got down in 1937, it follows that they had not got down in 1934.

However, I have heard evidence to the effect that in 1934 those persons who made the excavations for the underpinning of McCarthy's houses found and cut roots which were going down below the foundations of the house. It may be said that the foundations of the house were shallow, and that the foundations might have been lower, but the fact remains that, in my view, in 1934, the roots were found to be going down below the foundations of the house.

I myself have seen those roots in 1939, and, if one can believe the evidence of one's own eyes, it is quite obvious that there are numerous roots going below No. 83 and No. 85. There are not as many as there were in 1938, because some of them have now been cut, but it is quite obvious that in 1937 there were roots, as the evidence has proved to me, going down below the foundations of those two houses. As I have said, the roots of a poplar tree are shallow, and they run just below the surface, but, when they meet an obstruction such as the foundations of a wall, they will, being unable to go any further in the direction in which they are then running, proceed either to dive below or to come up to the top. They will dive below if there is water for them to find, and that is exactly what has happened in this case.

There is one other matter to which I think reference should be made, and that is that both in the garden of No. 83 and in the garden of No. 85 (and, although I have not seen it, in the entrance in the Avenue according to the evidence) cracks appeared in the ground. Those cracks ran exactly parallel to the line of the poplar trees, and, with regard to the crack in the ground at No. 83, as time went on that crack moved, so to speak, to the north. As one knows (and as is the evidence before me), in a dry summer, or after a period of drought, cracks do appear in the ground. The extraordinary thing about the cracks in this present case, however, is that they have moved out away from the poplar trees as time went on, and they run exactly parallel to the line of the trees, which would seem to indicate that the ground to the south of those cracks was being drained, and that the drainage of the ground was gradually spreading, taking the garden at No. 83, in a northerly direction. That is exactly what one would expect if there were roots burrowing out to the north and gradually draining the clay under the top soil.

One other matter deserves consideration, and that is this. I have had a certain amount of evidence before me from a man who was the agent of some insurance company which held a mortgage, I think, on one of these houses. He has told me (and, indeed, there is evidence from other sources) that in this particular area there are 18 houses which have been built by the same builder, one Scudamore, including these houses, and that in none of the other houses has there appeared anything like the damage which appears in these two houses. The sun shone with the same heat in 1933 and 1934 upon the sites of those other houses as that with which it shone in 1937, yet apparently the clay, if there was clay under those houses, was not shrunk by the action of the sun. Although it is not my function to decide cases by reason of curious coincidences, nevertheless the coincidence is rather strong when one bears that in mind and when one finds that the only houses which show any signs of subsidence are houses close to which have been planted the poplar trees which have this propensity for drying up the clay, and when one knows that the roots of these poplar trees, as I have said, had reached to a spot underneath the foundations—in the case of McCarthy's house in 1934, and in the case of Butler's house in 1937.

One curious feature there is with regard to this case. I have said that, in respect of the houses built along Green Lane, there is no sign of subsidence except in these two houses, the houses to which I refer being the houses built on the east side of Green Lane. On the west side of Green Lane, there are houses, not, I think, built by the same builder. In fact, I think some of the cottages which are on the west side of Green Lane are a few years older, though it does not matter whether or not they are a few years older. There is no sign of cracking or subsidence in those houses. The only sign of any cracking in any of the houses in the area is cracking not nearly so severe as in the houses No. 83 and No. 85, but indicating, in my view, trouble in the foundations in two houses, No. 16 and No. 23, which are on the opposite side of the sports ground or recreation ground to the houses No. 83 and No. 85. Those houses are a considerable distance away, and, curiously enough, close up to those houses there is planted a row of poplar trees. Those poplar trees, although they were planted apparently at the same time, have not flourished as have the poplar trees in this particular avenue, which indicates that the soil in which they are planted is not so damp, and does not suit them so well, as the soil in the Avenue. That is a matter which may be said to be a coincidence, but it is an extremely striking coincidence that the only sign of subsidence in the whole of this area should be in houses close to which poplar trees have been planted.

As I have said, I am satisfied that the cause of this subsidence is the action of the roots of these poplar trees. The only way in which it is sought to show that what I have just mentioned as purely a coincidence is that the experts called by the defendants, in particular Dr. Faber, have said that the reason for that is that most unfortunately McCarthy and Butler have each bought houses which happen to be on a pocket of particularly damp clay in this neighbourhood, and apparently it is the only pocket of damp clay in the neighbourhood. Dr. Faber tells me (and I accept it, of course) that the wetter the clay the worse is the shrinkage, and that, therefore, if there is clay with a considerable amount of water content, directly it dries up it acts as a sponge, and shrinks to a greater extent than a clay which contains less water, and the only explanation which can be given is that this is on a pocket of clay, or, it is said, there may be some water—not necessarily a subterranean water course or ditch—but, Dr. Faber says, there is obviously a pocket of water there.

Another expert was called before me, one who has some skill (and, I have no doubt, considerable skill) with the divining rod. He tells me that, when he went there, he tried, I think he said 50 yds. to the north and 50 yds. to the south of this avenue, and the hazel twig remained quite stationary until he got outside and close up to Butler's house, No. 85, where, he says, the twig bent down and indicated that there was water there. That there is water there is beyond question, and, as Dr. Faber and others have explained to me, the wetter the clay, the better it is. The only trouble with clay is when it is drained of its water. It then begins to shrink. I have no doubt whatever that this was, if I may use the expression, a wet patch, but I am quite satisfied that that wet patch would have held but for the fact that, by the action of the poplar trees planted by the defendants, that wet patch was drained, causing the clay to shrink. I find as a fact that the plaintiffs have satisfied me that the cause of the collapse is the shrinkage of the clay caused by the action of the roots of the poplar trees.

I ought perhaps to mention that the experts, or certainly one of the experts called by the plaintiffs, attributed the condition of the cracks in these houses to three causes. The first cause, he said, was the shrinkage of the clay, and he agrees with all the other experts that the action of these roots is to drain the clay, causing the clay to shrink and thus rendering the foundations unstable. However, he also gave two other causes, and, if I read his evidence aright, of those two other causes he attributed little to the third cause which he gave, but he thought that the second cause which he offered in conjunction with the first—namely, the draining of the water from the clay—was the cause of the trouble. The second cause which he gave, if I understand his evidence correctly, is this. He said that, as the clay is drained by the action of the roots—I am not putting it scientifically, I know, but as I understand it—the clay becomes more brittle. It becomes drier, and, when there is a root running through dry ground as compared with wet clay, then, when there is a gale of wind, the poplar tree sways in the wind, and that puts a strain upon the roots of the poplar tree. The illustration is given of an anchor, the roots of the poplar tree or the roots of any tree being the anchor to anchor the tree securely into the ground. When there is a strain put on the top of the tree by swaying about, there is a certain amount of pull on those anchors, or, perhaps it would be more accurate to say, on the anchor chain, and, if the ground into which the chain and anchor are placed begins to get brittle, there is a movement which leads to further disintegration of the soil in which that anchor and chain are placed. Dr. Faber and the witnesses for the defendants rather discounted that theory. It was said that, the nature of a poplar tree being that it is very whippy, a poplar tree whips about and takes all the strain in the butt of the tree, so that no strain is imparted through the tree to the roots. Whether or not that is sound is a little difficult to say, but I confess that I should have thought, although it may be only a question of degree, that, if the top of the tree is swaying about in the wind, there must be a strain, or tendency to movement, down the whole butt of the tree which spreads to the roots. It is, of course, a question of degree, and it may be that in this case there was no further damage caused by any movement, if there was any, in the roots of the trees.

The third reason given by the expert called for the plaintiffs was this. He said that he also thought that the action of these roots, when they got under the foundation, would be to push up, and he gave the instance of how fungi will actually push up a paving stone very often. The growth of the thing is so strong that it will even push up a great heavy paving stone. He suggested that some of the damage might be caused by the larger roots getting underneath the foundations and pushing up, and so causing cracks to appear in the brickwork. He did not dogmatise about it. He said that he thought that that was possible, but he did not attribute the damage in this case really to any such action of the roots. He thought it was a combination of the first two—namely, the draining of the clay and the movement of the roots.

Whether or not he is right about the second reason I do not think it is necessary for me to decide, because I am quite satisfied that the reason for the subsidence is the draining of the clay. It is agreed by the defendants that that is the reason, and the only question which I have to decide, as I have already said, is what caused that draining of the clay. I am quite satisfied that it was the action of the roots of the poplar trees which caused that clay to drain and so caused the subsidence.

The defendants in this case through their counsel have argued that in law, as I understand the argument, even assuming that this trouble was caused by the roots of these trees, that does not give the plaintiffs any right of action. There were cited to me various cases which I have had an opportunity of considering, and, without, I hope, any disrespect to his argument, I am not satisfied that those cases support the contention which he sought to put forward. It is quite true that, apparently, as far as the research and diligence of counsel is a guide, there is no case recorded in the books of an action having been brought for nuisance or for trespass owing to damage alleged to have been caused by the action of the roots of a tree. There are many cases, of course, of actions brought for damage caused by overhanging branches, but there is apparently no case in the books of an action for damage caused by the roots of a tree, except *Middleton* v. *Humphries* (1), a case decided by Ross, J., in Ireland. That was a case in which the plaintiff alleged that his wall had been damaged owing to the action of the roots of a tree on the defendant's land, which had burrowed under the wall and caused it to collapse. In that case, Ross, J., had no doubt whatever that that gave a cause of action just as though the wall had been damaged by the overhanging branch of a tree on the defendant's land, and he accordingly granted an injunction restraining the defendant from continuing to permit the injury, and awarded damages. It appears to me that that decision—which, if I may say so with the greatest respect, I think is perfectly right—draws no distinction, either in law or in fact, between damage caused by overhanging branches and that caused by roots which burrow and cause damage. Indeed Gale on Easements, 11th Edn., takes the same view, and the passage at p. 438 to which counsel for the plaintiffs referred has been cited with approval in cases decided in these courts.

It seems to me that it is clear that an action will lie on the facts which I have already detailed, and that, not only is there a right for a plaintiff who has so suffered to cut the roots of the offending tree, but he is also entitled to recover damages, if damage has accrued to him or been suffered by him owing to the action of these roots.

Of the many cases which counsel for the plaintiffs cited to me, I need only refer to *Smith* v. *Giddy* (2), and particularly to the judgment of KENNEDY, J., at p. 451, and also to *Crowhurst* v. *Amersham Burial Board* (3) and *Lemmon* v. *Webb* (4). In *Lemmon* v. *Webb* (4), KAY, L.J., has summed up the authorities on this part of the law, at p. 24 :

> The result of the authorities seems to be this :—The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so.

Then KAY, L.J., goes on to discuss the question of notice.

It seems to me that in law this action will lie, and that, in view of the facts which I have found, the plaintiffs are entitled to recover.

Judgment for each plaintiff for £225 damages and costs.

Solicitors : *Janson, Cobb, Pearson & Co.* (for the plaintiffs) ; *Merrimans* (for the defendants).

[*Reported by* A. GRIMBLE, ESQ., *Barrister-at-Law.*]

Distinguished. KELLY *v.* BATTERSHELL. [1949] 2 All E.R. 830.

NEWMAN *v.* REAL ESTATE DEBENTURE CORPORATION, LTD., AND FLOWER DECORATIONS, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **October 18, 19, 20, November 10, 13, 27, 28, 29, December 5, 1939.]**

Landlord and Tenant—Restrictions on user—Common scheme—Flats in one house let subject to similar covenants as to user—User for private residence only—Notice of restriction—Registration—Law of Property Act, 1925 (*c.* 20), *s.* 199—*Land Registration Act,* 1925 (*c.* 21), *s.* 50—*Land Charges Act,* 1925 (*c.* 22), *s.* 10 (1) D (*ii*).

Landlord and Tenant—Derogation from grant—Property subject to restriction—Letting for purposes inconsistent with restriction.

Nuisance—Letting for business purposes—Noise.

By lease dated Dec. 20, 1935, the plaintiff leased from the first defendant, the corporation, the fourth and fifth floors of what was then, with the exception of the ground floor, a block of residential flats. The lease contained certain covenants by the lessee restricting the user of the flat to residential purposes only, and in fact, all the then-existing leases of other flats contained the same covenants as to user, the restrictions being clearly intended to be for the benefit of the flats and their tenants, and making up a body of local law imposed upon the tenants. On Aug. 12, 1938, the corporation leased the whole building to the second defendants, the company, with the benefit of the lease granted to the plaintiff. Alterations to the building were then carried out in accordance with the local authority's requirements for business purposes, the main alterations being the changing of doors on every floor, the substitution of clear glass for stained glass on the stairs, and the insertion of a lift which started in the basement and came up through the first, second and third floors, the shaft ending just under the end of the plaintiff's bedroom. The lift was fitted with iron collapsible doors. The work continued until the middle of November, and was during that time a source of annoyance and inconvenience to the plaintiff. On the completion of the work, the company commenced its business, the first floor being used as a showroom and for offices, the second for a workroom, and the third for the accounts department and a stockroom. The plaintiff alleged that the business as carried on constituted a common law nuisance rendering his flat materially less fit to live in for the reasons, firstly, that the company's vans obstructed the highway so as to interfere substantially with the reasonable access to the entrance to his flat; secondly, that the company's employees were constantly running up and down the stairs; and thirdly that excessive noise was caused by the movement of the lift, and closing of its collapsible doors, and also by the banging of the doors on all floors. The plaintiff contended that there existed a scheme for the benefit of the tenants of the flats in the building, under which the building could be used only for residential purposes, and that there was, therefore, an implied covenant with the plaintiff binding the corporation not to let the flats for any other purpose. It was also contended that as the flat was let for the purpose of the plaintiff and his wife using it as a residence, they were confined to that user, and there was therefore an implied obligation upon the corporation not to derogate from its grant by rendering the flat materially less fit for that purpose. The evidence showed that the company, its agents and advisers had inspected the building and knew of the essential facts raising the presumption that there was or might be a scheme for using the flats for residential purposes only:—

HELD: (i) the plaintiff had established that there was a scheme which imposed, *inter alia*, an obligation on the corporation not to let any of the flats other than the ground floor for other than residential purposes, nor to permit any tenant of any other flat to do anything which might cause annoyance to the plaintiff.

(ii) the corporation could not derogate from its grant, and the letting of the flats for business purposes was such a derogation.

(iii) the company's advisers should have made inquiries as to the existence of a scheme applicable to the flats which would have satisfied them that the company was doing something inconsistent with the scheme. The company, therefore, took with notice of the restrictive covenants and were bound by them.

(iv) as the company was sued not as lessee of one of the flats but as owner of the leasehold reversion bound by the head lessor's covenants, these covenants were not capable of registration under the Land Charges Act, 1925, s. 10 (1) D (ii), or of being noted in the register under the Land Registration Act, 1925, s. 50.

(v) the corporation and the company had both broken the obligation not to derogate from the grant to the plaintiff, the corporation by the nuisance created during the alterations, and the company by the nuisance created by the way in which its business was conducted.

(vi) an injunction would be granted against the company restraining it from breaking the covenant as to user, and damages against both defendants in respect of breaches of the covenant as to user and the covenant not to derogate from grant.

[**EDITORIAL NOTE.** The principle generally known as the building scheme is commonly applied to a substantial area. It has in the past been applied to blocks of flats of considerable size, but not, apparently, to a building of the size here considered. However, no lower limit to the size of the "building estate" has ever been suggested, and it seems logical that the principle should be applied even to a small number of flats in a single building, since the user of any one part of the premises must materially affect the comfort of the remainder. A more important aspect is the discussion of the registration of restrictive covenants. The statute exempts from registration covenants between a lessor and lessee, and it has been said that the reason for this is because the assignee of a lease always inspects, or should inspect, the lease. On the other hand, a sublessee is not, apart from special stipulation, entitled to see the head lease, and similar considerations apply where the premises originally demised are assigned in separate parts. It is important, therefore, that the words "covenant between a lessor and lessee" should be construed by the court, but the present case does no more than commence the process of construction. It seems important that something more precise should be said on this matter, or that the statute should be amended.

As to Derogation from Grant, see HALSBURY, Hailsham Edn., Vol. 20, pp. 243-246, paras. 271-277; and for Cases, see DIGEST, Vol. 31, pp. 122-141, Nos. 2557-2768.

As to Restrictions on the User of Leasehold Premises, see HALSBURY, Hailsham Edn., Vol. 20, pp. 224-233, paras. 245-255; and for Cases, see DIGEST, Vol. 31, pp. 157, 158, 169, Nos. 2905-2915, 3016-3019.]

Cases referred to:

(1) *Hudson* v. *Cripps*, [1896] 1 Ch. 265; 31 Digest 135, *2701*; 65 L.J.Ch. 328; 73 L.T. 741.

(2) *Gedge* v. *Bartlett* (1900), 17 T.L.R. 43; 31 Digest 158, *2914*.

(3) *Spicer* v. *Martin* (1888), 14 App. Cas. 12; 31 Digest 166, *2997*; 58 L.J.Ch. 309; 60 L.T. 546.

(4) *Jaeger* v. *Mansions Consolidated, Ltd.* (1902), 87 L.T. 690; 31 Digest 97, *2368*; *on appeal* (1903), 87 L.T. 694.

(5) *Elliston* v. *Reacher*, [1908] 2 Ch. 665; 28 Digest 448, *675*; 78 L.J.Ch. 87; 99 L.T. 701; *affg.* [1908] 2 Ch. 374.

(6) *Renals* v. *Cowlishaw* (1879), 11 Ch.D. 866; 40 Digest 316, *2686*; 48 L.J.Ch. 830; 41 L.T. 116.

(7) *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305; 40 Digest 312, *2665*; 78 L.J.Ch. 753; 100 L.T. 952.

(8) *Keates* v. *Lyon* (1869), 4 Ch.App. 218; 40 Digest 314, *2673*; 38 L.J.Ch. 357; 20 L.T. 255.

(9) *Nottingham Patent Brick & Tile Co.* v. *Butler* (1886), 16 Q.B.D. 778; 40 Digest 314, *2674*; 55 L.J.Q.B. 280; 54 L.T. 444.

(10) *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138; Digest Supp.; 99 L.J.Ch. 84; 142 L.T. 198.

(11) *Harrison* v. *Southwark & Vauxhall Water Co.*, [1891] 2 Ch. 409; 36 Digest 162, *44*; 60 L.J.Ch. 630; 64 L.T. 864.

(12) *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd., and D'Allessandri*, [1900] 2 Ch. 373; 36 Digest 175, *204*; 69 L.J.Ch. 579; 82 L.T. 758.

(13) *Ball* v. *Ray* (1873), 8 Ch.App. 467; 36 Digest 194, *354*; 30 L.T. 1.

(14) *Dare* v. *Bognor Urban District Council* (1912), 76 J.P. 425; 12 Digest 615, *5088*.

(15) *Browne* v. *Flower*, [1911] 1 Ch. 219; 31 Digest 135, *2703*; 80 L.J.Ch. 181; 103 L.T. 557.

(16) *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200; 31 Digest 136, *2707*; 90 L.J.Ch. 140; 124 L.T. 418.

(17) *O'Cedar, Ltd.* v. *Slough Trading Co.*, [1927] 2 K.B. 123; Digest Supp.; 96 L.J.K.B. 709; 137 L.T. 208.

(18) ***Walter* v. *Selfe*.**

Action for an injunction and damages for an alleged breach of covenant by the two defendants not to use the premises for other than residential purposes, and for damages for trespass and nuisance. The facts are fully set out in the judgment.

G. R. Blanco White, K.C., *Valentine Holmes* and *John Senter* for the plaintiff.

J. W. Morris, K.C., and *H. G. Robertson* for the first defendants.

J. D. Casswell, K.C., and *F. W. Beney* for the second defendants.

ATKINSON, J.: This is an action brought by George Newman, the holder of a lease dated Dec. 20, 1935, for 7 years from Dec. 25, 1935, of a flat on the fourth and fifth floors of what was, until the happening of the matters complained of, a block of residential flats known as Cleveland Mansions, 64, South Audley Street, against his lessors, the Real Estate Debenture Corporation, Ltd. (hereinafter called the corporation), and Flower Decorations, Ltd. (hereinafter called the company), who are lessees of the whole building under a lease granted to them by the corporation, dated Aug. 12, 1938, with the benefit of the lease granted to the plaintiff.

The substance of the plaintiff's claim is that, when he took his lease, the building was being used solely for residential purposes, and that the corporation were under an obligation to maintain that user throughout the term of his lease, but that, instead of so doing, they let the whole of the rest of the building to the company for business purposes, thereby changing the whole character of the building, and that the business has been carried on by the company so as to be a nuisance to the plaintiff, and so as to render his flat materially less fit for residential purposes. The plaintiff must, of course, establish a legal basis for the alleged restrictive obligations resting upon the corporation, his lessor. For that purpose, it is said first that there existed a scheme under which every tenant was bound, for the benefit of the tenants of the other flats in the building, to refrain from using his flat otherwise than as a residence, and that, therefore, the lessors could not lawfully themselves do anything inconsistent with the scheme they had created or maintained. It is said that there was, therefore, an implied covenant with the plaintiff binding the corporation not to let the other flats in the building otherwise than as residential premises. It is also said that, at any rate, the flat was let for the purpose of the plaintiff and his wife living in it as a residence, and they were confined to that user, and that there was, therefore, an implied obligation upon his lessors not to derogate from their grant—that is, not to do anything which would render the flat materially less fit for that purpose.

If it is established that these obligations rest upon the corporation, the question arises as to how far the company are bound by them. The covenants are both restrictive in their nature, and would, *prima facie*, bind the company if they took this lease with actual or constructive notice of them, or, rather, with notice of the facts and circumstances from which they are to be implied.

The history of the building starts in 1892. It was then a new building belonging to the Duke of Westminster. On Aug. 20, 1892, the Duke demised the building to one Frederick George Best for 99 years. Except for the ground floor, which was designed as a shop—obviously the most suitable purpose to which it could be put—the rest of the building was designed for, and laid out as high-class residential flats. The entrance to the shop is at the corner of South Audley Street and Aldford Street.

Some 20 yds. down Aldford Street are the porch and entrance to the rest of the building. Entering by that porch into the hall, one was faced on the left front by stairs going up to the first and other floors, and, on the right front, by stairs going down to the basement. On either side were unbroken main walls. There was no connection with the shop, and
A nothing to suggest that on the other side of the main wall on the left there was a shop where business was carried on. The head lease contained the following covenants material to this case, and I think the three are 10, 11 and 12. Covenant 10 provides as follows:

> . . . will not without the previous written consent of the landlord for the time
> B being for the following purposes respectively make or permit to be made upon any part of the said demised premises above the ground floor any show of any trade or business whatsoever nor place or set up nor permit to remain upon the said demised premises or any part thereof [which of course extends to the ground floor as well] any forge nor use or permit to be used the said demised premises or any part thereof as a place of public entertainment nor carry on or exercise or permit to be carried on or exercised upon the said demised premises or any part
> C thereof any or either of the trades or businesses following . . .

Then follows a long list of almost every conceivable trade of which one can think, ending up with the words:

> . . . or any other art trade business or employment whatsoever which shall be dangerous or a nuisance or an annoyance to the tenant or occupier of any messuage
> D or other hereditaments in the neighbourhood of the premises hereby demised.

Then covenant 11 provides as follows:

> . . . will not keep any fowls nor do or permit to be done upon the said demised premises or any part thereof any act deed or thing which shall or may be or become a nuisance (whether indictable or not) or which may be grow or lead to the damage annoyance or disturbance of the landlord for the time being or the tenant or
> E occupier of any adjacent property.

Then covenant 12 provides as follows:

> . . . will not make or permit to be made any alteration in the construction height elevation or architectural appearance of the said demised premises or any part thereof or in the chimney stacks or chimney pots thereof nor alter or cut any of
> F the principal walls or timbers thereof nor erect or build any additional or any substituted building . . . without the previous consent of the landlord.

Best occupied the shop and carried on business there as a portmanteaux-dealer. From the date of the lease, the flats had been let for residential purposes only. So far as concerns the appearance of the building, or the
G impression that would be made, before the matters complained of, upon the mind of anyone entering the hall and going up the stairs, I do not think that it would have occurred to anybody that the building was being put to any other use.

Best retained the lease for many years. His agents for letting the
H flats were Messrs. Collins & Collins. Mr. A. P. Saunders, a member of that firm, has given evidence. I gathered from him that Best's executors were two people named H. E. Manfield and Philip Bush, that in 1924 there was a sale by auction by order of the court, when the lease was bought from the executors by a Mrs. Turrill, and that early in 1935 the corporation bought from her. The earliest lease produced, dated

June 25, 1923, was one between Manfield and Bush and Davies. It demised the third-floor flat for 14 years. On Mar. 8, 1928, Mrs. Turrill demised the second-floor flat to Barnato Joel for 14 years. On Mar. 6, 1928, Mrs. Turrill demised the first-floor flat to Mr. Cran for 7 years. On Nov. 8, 1934, she let the first-floor flat to a Mrs. Halford as a yearly tenant. She had held under an underlease from Mr. Cran. On Dec. 4, 1934, Mrs. Turrill let the shop and that part of the basement fronting South Audley Street to Mrs. Constance Spry for 21 years. Then the corporation bought the leasehold reversion of the building, and on Dec. 20, 1935, they demised the fourth and fifth floors to the plaintiff.

Before taking the lease, Newman and his wife saw the agents, Messrs. Norfolk & Prior. One of their representatives showed them the flat. Newman said that he could see that the others were all residential. Among other things, the names of the occupiers were above the bells. Mrs. Newman asked about the other tenants, and was assured that they were nice quiet people and everything that one could desire. It was just residential, very quiet and comfortable, she was told. Newman was told that very good references would be required. He gave three business references, but was then asked for three social references. Rather surprised, he asked why, and was told that the people living in the flats were of such good standing and so high-class that it was necessary to be very particular, and that they always wanted them.

The lease is dated Dec. 20, and, as I have said, leases the flat on the fourth and fifth floors :

> . . . of the messuage known as No. 64 South Audley Street together with full and free liberty at all times in common with others of the use of the porch and entrance hall and to pass and repass over and upon the staircase leading from Aldford Street to the said fourth and fifth floors . . .

Then came a series of covenants. I will begin with covenant (*g*), which provides as follows :

> . . . to properly clean the windows belonging to the demised premises once at least in every month of the said term and as often as need or occasion shall require thoroughly to sweep and cleanse all chimneys and flues and to keep the taps in repair.

Then covenant (*h*) provides as follows :

> . . . not to maim cut or injure any of the walls or wood or ironwork nor alter the cornices ceilings mantelpieces or ornaments or any of the fixtures or the general construction or plan of the demised premises without the previous consent in writing of the lessor [and then to restore].

Then covenant (*i*) provides as follows :

> . . . to occupy and use the demised premises as private dwelling-rooms only and not to use the same or any part thereof or permit the same or any part thereof to be used for any trade business or calling whatsoever or for any unlawful or immoral purpose and not to deposit therein any stores of coal or any combustible or offensive goods provisions or materials and not to exhibit any placard on any part thereof nor hang or allow to be hung any clothes or other materials on the outside of the demised premises nor to make any noise or do any act or things which may cause scandal or occasion annoyance damage or disturbance to the lessor or the lessors other tenants or whereby the insurance of the demised premises or any part thereof against damage by fire would be made void or voidable or whereby

the rates of premium payable in respect of such insurance would be increased beyond the ordinary rate.

Then covenants (*j*) and (*k*) provide as follows :

> (*j*) Not to permit any public auction or sale. (*k*) To observe and comply with all reasonable regulations and arrangements which may from time to time be made by the lessor for the proper management of the building or for the general comfort and convenience of the tenants and occupiers thereof and not to do or permit anything which may be contrary to or inconsistent with such of the covenants and conditions of head lease of the building from His Grace the Duke of Westminster as appear herein and to indemnify the lessor in respect of any breach by the lessee of such covenants and conditions.

Then covenant (*l*) provides as follows :

> . . . to permit the lessor its agents and workmen at all reasonable times during the said term upon appointment being made to enter the demised premises for the purposes of repairing or painting the outside of any part or parts of the building or for carrying out any structural or other repairs or any alterations or additions which may be required in or to the building or to cleanse empty or repair any of the sewers drains gutters or pipes . . .

The covenants by the lessor include a covenant for quiet enjoyment and a covenant to perform the covenants contained in the lease under which the lessor held the building, and covenant (*c*) provides as follows :

> . . to keep the building of which the demised premises form part and the structure of the walls of the demised premises and the pipes tanks and electric wiring thereof (except such said pipes tanks and electric wiring as are contained in the demised premises) in good and tenantable repair and condition.

Then covenant (*e*) provides as follows :

> . . . to keep the porch entrance hall and staircase of the building in good order and condition and properly cleaned and lighted.

I have no doubt whatever that Newman took it for granted that everyone held subject to the same restrictions, and that every newcomer would hold on the same restrictions. All the then-existing leases did in fact contain the same covenants in so far as material to this case, certainly all those which I have read. Davies' lease had the extra words in the clause forbidding any trade or business : " and will not keep therein any noisy or objectionable animal bird or reptile." The clause in the plaintiff's lease about reasonable regulations contained the words which I have read : " for the proper management of the building." Those six words are not in any of the other leases, but, apart from those two differences, I think that every relevant clause is identical in all the leases. There may be an odd word different here and there, but I have compared them sufficiently carefully to satisfy myself that, except possibly for an odd word—not that I came across one—in substance they are alike.

It is plain that each lease shows on the face of it that it was made in respect of a residential flat forming part of a building which was used for the same particular purpose. The restrictions were clearly intended to be, and were in fact, for the benefit of the flats and their tenants. The restricted user cannot be explained as being necessary to secure compliance with covenants in a head lease. I have no doubt that each lessee either knew or took it for granted that the restrictions imposed on him were also imposed on the other lessees, and were so imposed for their mutual benefit *inter se*. I have no doubt that the various lessors knew that their lessees so believed, and that it was upon that basis that they took their leases. Mr. Ritchie, who acted for Mrs. Turrill, and who was called as a witness, said they wanted all the lessees to take it for granted that the only permitted user of all the flats was for residential purposes, and that the appearance of the building would itself create that impression. A general observance of the restrictions was certainly calculated to enhance the value of the various flats, and would enure for the benefit of their occupiers as well as for that of the lessors. There were, in fact, no written regulations, because the lease itself contains a number as to washing, coal and one thing and another. There was a porter in uniform. Mr. Newman was told when he went in that the doors of the porch entrance were to be closed at 8 p.m., and that from 8 p.m. to 11 p.m. the bell marked "Housekeeper" could be rung for the door to be opened, but that after that he must use the key provided. He also found that there were existing practices as to ash-bins, letters and parcels and the like.

What is the proper inference from these facts? What is necessary in order to create what is called the scheme? The first case to which I was referred was *Hudson* v. *Cripps* (1). That was a case relating to a block of flats, and the relevant covenant was described as follows [at p. 266]:

> The tenant agreed "not to assign, underlet, or part with the possession of the same premises or any part thereof, nor to carry on or suffer or permit to be carried on thereon any trade or business whatsoever, nor permit any sale by auction, nor pull down or alter the construction . . . nor use the premises or any part thereof otherwise than for the purpose of dwelling-rooms; and further [not to] affix or exhibit any advertisements, placards . . . nor commit or suffer or permit any voluntary waste or spoil, nor do any act which may be or grow to be a nuisance, disturbance, annoyance or injury to the landlord or his tenants, or any of them or to the trustees of the late Duke of Portland . . ."

It is a covenant exceedingly like the covenant in this case. The regulations and conditions annexed to the agreement, and which formed part of it, which indeed was a printed document, are set out at p. 267. They relate to the keys, the supply of coals, disposal of house refuse and so on. The landlord was there seeking to turn a number of flats into a club, and one of the tenants had brought an action to restrain him. The only reason why I refer to the judgment is because of the light I can get on what it is necessary to show in order to prove the existence of a scheme.

In that case, NORTH, J., said at p. 268:

> The agreement shews, on its face, that it was made with respect to a certain flat forming part of a large building all used for this particular purpose . . .

Of course, every word of that applies to this case. Then NORTH, J., continued as follows, at p. 268:

> Now, looking at the agreement itself, the printed agreement, to begin with, is evidently not intended to apply to this particular flat alone. No one can read those

> provisions without seeing that there was a scheme for the general management of this building, composed of several flats, in such a way as to be suitable to the convenience of all the persons who should be tenants of the respective flats. It would be idle to suppose that these requirements were made except for the purpose of the convenience of all the tenants; and where the landlord enters into such an arrangement with each tenant it is obviously intended to be and is, as a matter of fact, for the benefit of all the tenants. Whether this house was built originally with any such scheme in view I do not know, and it seems to me entirely unimportant. There were, at any rate, existing a collection of flats, each occupied in a similar manner, under a common management, by different tenants.

The next case in order of date bearing on the point is, I think, *Gedge* v. *Bartlett* (2). There, according to the headnote, the plaintiff had taken:

> . . . lease of a flat in a building from the defendant, the plaintiff covenanting to use the flat for residential purposes only. The other flats in the building were let by the defendant with similar covenants by the lessees, but there was no express corresponding covenant by the defendant as to the use of the flats. The defendant subsequently let some flats in the building to the government for public offices, and possession was given to them.

Then the plaintiff brought an action in respect of this alleged breach, and BUCKLEY, J., said, at p. 44:

> . . . that there had clearly been a breach of an implied covenant by the defendant that the flats should be used for residential purposes only . . .

The rest of the case turns upon whether or not an injunction should be granted. He granted a limited injunction. There was an appeal, and the injunction was in its terms extended.

Counsel for the lessors was good enough to take the trouble to look at THE TIMES for Jan. 30, 1900, and there there is a slightly fuller report, or at any rate some of the things that BUCKLEY, J., said are reported slightly more fully. The relevant part of the note which he has handed to me, and which is copied from the newspaper, is as follows:

> BUCKLEY, J., in delivering judgment, said it was not disputed that the principles laid down in *Spicer* v. *Martin* (3) and *Hudson* v. *Cripps* (1) applied to the case. The other leases of flats in the same building contained covenants in similar form to the benefit of which the plaintiff was entitled.

That, therefore, indicates that there was a block of buildings with a number of flats, and that in each lease there was a restrictive covenant imposed upon the tenant as to the use of the flats, and it is plain there that it was taken for granted by counsel for the defendants, and by everybody, that in a case of that sort there was a scheme.

Then the next case was *Jaeger* v. *Mansions Consolidated, Ltd.* (4). There the case did not arise in a particularly convenient way, because objection was taken that the statement of claim disclosed no cause of action and the application was struck out. BUCKLEY, J., of course, had to deal with the case on the footing that everything alleged in the statement of claim was true and well-founded. There are only one or two short passages, I think, which help me here. BUCKLEY, J., said, at p. 693:

> I then pass to the second head of the claim—namely, that founded upon the existence, which is not denied, of a general scheme, all the flats in the buildings being let under a common form of agreement.

He held there was a case to meet, and his view was upheld by the Court of Appeal, and I will just read a few lines from the judgment of SIR RICHARD HENN COLLINS, M.R., at p. 696:

> The flat in the occupation of the plaintiff was let—as all the other flats in the building are let—upon a document drawn up in the same form for all the tenants. That is a document which shows on its face that one of the main purposes is to secure that the flats occupied by persons taking them shall not be used for immoral purposes [the alleged breach in the particular case]; and every kind of precaution in the shape of agreement is taken authorising the summary eviction of any person who infringes that obligation, and showing that the scheme upon which these flats are let is that they can all be occupied in a respectable manner, and entirely negatives the possibility of anything like a use for immoral purposes . . .

There again one has an indication that the important point to inquire into is whether or not the common lease shows on its face that it is intended for the common good.

Then came *Elliston* v. *Reacher* (5), which was discussed at some length. That was a case of a building estate, not a case relating to flats, and it was a case where the action was brought against another purchaser, and not against a landlord. I am not going to worry about the particular facts there. It is the principle I want to get at, and that is laid down by PARKER, J., as follows, at pp. 384, 385:

> I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of *Renals* v. *Cowlishaw* (6) and *Spicer* v. *Martin* (3) into operation it must be proved (1) that both the plaintiffs and defendants derive title under a common vendor [which does not apply here, because it was the landlord, the lessor, who was being sued]; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point.

If one applies what is there said to a block of flats, a scheme certainly is established and a covenant implied binding the lessor not to act in contravention of it where it is established that, previous to the demise to the plaintiff, the lessor or his predecessors in title had designed and constructed the building for letting as residential flats, subject to restrictions intended to be imposed on all the flats, which, though possibly varying in detail, were consistent, and consistent only, with a general scheme of management, that these restrictions were intended by the lessor to be and were in fact for the benefit of all the flats, and that the A plaintiff took his lease upon the footing, or in the belief, that the restriction would enure for the benefit of the other flats, and on the well-founded assumption that there were similar restrictions binding the other flats, which would in turn enure for his benefit. Undoubtedly a general observance of these restrictions would in fact enhance the value of the flats, B and it is, therefore, an easy inference that the lessor intended the restrictions to be for the benefit of all the flats. I think that everything there applies to this case.

Then comes *Reid* v. *Bickerstaff* (7), which I think is, as far as I know, the last word on this topic. There again it was a building scheme relating C to the sale of houses, and a number of plots had been sold at different times, all with the same restrictive covenant in them—namely, not to erect any building but a private dwelling-house—and somebody was breaking the covenant, and one person sued another. JOYCE, J., held that there was a scheme there. He was overruled by the Court of Appeal, D but it was not questioned that the court would apply the principle which he laid down. He said, at p. 312:

> The question whether the several purchasers of parts of a building estate are entitled to enforce against one another the restrictive covenants that they have respectively entered into depends upon the intention which is to be gathered from all the circumstances in each case—that is to say, whether the restrictions were imposed E merely with the object and intention of in some way protecting the vendor himself, as in *Keates* v. *Lyon* (8), or for the mutual benefit and advantage of the purchasers, as in the case of *Nottingham Patent Brick & Tile Co.* v. *Butler* (9).

He held, therefore, that the claim was established, but the Court of Appeal thought not. SIR H. H. COZENS-HARDY, M.R., summarised the law, I think, as concisely as it can be done, at p. 319:

F

> What are some of the essentials of a building scheme? In my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be G houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area.

I think that that is a most helpful sentence, and, in my judgment, rightly H or wrongly, it absolutely applies to this case. There one has a block of flats where the area is clearly defined. One knows exactly the premises to which these various covenants are to refer, and, in my opinion, the covenants in this lease are obviously intended to be for the benefit of the other tenants, and do make up a body of local law imposed upon the occupants of these different flats.

Why did the Court of Appeal reverse JOYCE, J., in *Reid* v. *Bickerstaff* (7)? The points are set out by SIR H. H. COZENS-HARDY, M.R., as follows, at at p. 320:

> . . . the plaintiffs have wholly failed to define the area of the scheme. In the statement of claim they alleged three separate schemes of different parts of the estate of 64 acres. This has been abandoned, and they now contend for one scheme affecting the whole estate of 64 acres. There is no evidence of any such scheme. . . . A

Then the next point he made was this, at p. 321:

> There is no uniformity in the covenants in conveyances of different lots.

Thirdly, he said, at p. 321:

> There is nothing to shew that the purchaser of 1840 was aware that any of the B earlier purchasers had entered into restrictive covenants of any kind . . .

Therefore he held that the claim there failed. BUCKLEY, L.J., stated the same principle, not quite in the same language, at p. 323:

> There can be no building scheme unless two conditions are satisfied, namely, first, that defined lands constituting the estate to which the scheme relates shall C be identified, and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them.

To my mind, it is obvious on the face of this lease that these restrictions D are imposed for the benefit of the other lessees, since I find as a fact that the plaintiff believed that other lessees would be on the same footing.

I am satisfied that the plaintiff has established that there was a scheme which imposed, *inter alia*, an obligation on the corporation not to let the other flats for purposes other than residential, nor to permit any tenant E of any other flat to do anything which might cause annoyance to the plaintiff. I am also satisfied that there was an obligation upon the corporation not to derogate from their grant, and not to do anything which would render the demised premises materially less fit for use as private dwelling-rooms. The demise contained a covenant for quiet enjoyment, F but I doubt whether it is of much relevance in this case.

In the autumn of 1937, the company, who were still trading in the shop, were anxious to acquire the building, or as much of it as they could, for the purpose of their business, and for this purpose the London County Council required certain alterations to be made. The two base- G ments, which had been severed before, were to be connected, and there was to be a fireproof door inserted halfway down the stairs to the basement on the right as one enters. There was to be a doorway made between the shop and the hall, and every doorway of the flats had to be completely changed, and doors inserted which opened and shut with great ease. H The walls on the slope of the stairs, I think, were mainly stained glass lights with dark wooden window frames. They had all to be taken out and clear glass put in their place. One of the main features of the change was that a lift had to be inserted and constructed, not outside the flats, where one usually finds lifts, but starting in the basement below the shop and coming up through the shop and right up through the first, second and third floors, the shaft ending just under the end of Newman's bedroom. It was a small lift with collapsible iron doors. These alterations led to the London County Council insisting on a way of escape on to the roof for the occupants of the different floors, and the scheme which was A suggested by the defendants' architect, and which was approved and enjoined by the London County Council, involved the construction of a door just outside the plaintiff's two doors at the entrance to his flat on the fourth floor, the one on the left leading to the part where he lives, and, as to the one on the right, where one opens the door, there is a small B staircase up to some rooms on the fifth floor, and there was to be a door constructed at the head of the stairs in a fireproof screen, and some thin glass near the lock, so that in an emergency anybody could easily break the glass and open the door from the inside.

The plaintiff was told nothing of all this scheme. He heard nothing of C it until a day or two before he was going away on holiday on Aug. 18. Mr. Quint, a member of the firm of Norfolk & Prior, came to see him, and Newman said he was just going away for his holidays and did not want to be bothered then, obviously, but Mr. Quint told him roughly what was intended, and told him particularly about the work to be done D in his flat. The plaintiff said that it was useless discussing it then as he was going away, and he asked Mr. Quint to do nothing until he returned—that is to say, nothing in the way of work in the plaintiff's own particular flat—and Mr. Quint assented to that. When Newman got home in September, he found the work in his flat in full blast, and for some E weeks the noise and interference with the staircase were very serious from his point of view. The stairway was littered with ladders and scaffolding, interfering very much with easy user, but probably the more important thing was the constant noise of hammering. It was particularly bad in the making of the lift shaft. Apparently the floors were F made of concrete, and this concrete had to be hacked away. When it came to the painting, of course, everywhere was being painted—the hall, the landing, the staircase of every flat. It was all being done, as I gather it could, at one time, and the smell was intolerable, and made the plaintiff's wife ill. This work went on until about the middle of November. There G is no question at all about this work having been a nuisance, in fact, while it lasted. Whether or not it was an actionable nuisance, however, is another matter.

The business got into full swing, I think, about the middle of November. At first, it was probably under difficulties, but it was certainly going by H then. The first floor was called the wedding-room. It was a showroom, and there were offices. The second floor was the workroom, and some 15 or 20 girls were employed there making artificial flowers and making up fresh flowers. The third floor was the accounts department. It was a stock room, I gathered, for artificial flowers, but it was mainly used for the purposes of accounting and the keeping of the books. This continued without any change in the business until the outbreak of war, when, except for the shop, the basement, the first, second and third floors were closed down.

It is said that, quite apart from all this being a breach of covenant, the business as carried on was a common law nuisance, and a nuisance rendering the plaintiff's flat very materially less fit to live in. The complaints are three in number. There were some minor ones, but there are three with which I will deal. First there is a complaint as to the company obstructing the highway so as to interfere substantially with the reasonable access to the entrance to the flat. Then there is a complaint as to the use of the stairs, and it is said that, whenever one went on to the staircase, one would see employees of the company running up and down, perhaps with flowers, perhaps with parcels, perhaps with pots of tea and the like. The third complaint is as to noise.

To begin with the stairs, I am not satisfied that the use of the stairs in itself—and I am dealing now with the question of nuisance apart from covenants—amounted to a nuisance. Doubtless a number of employees passed and repassed up and down during the day. Doubtless it was used at times for the delivery of parcels and flowers to the workroom. I am equally satisfied that the hall was used rather than the steps down to the basement to the left of the porch. I am quite satisfied that at times the hall was used for bringing into the shop and down to the basement large wreaths and large parcels and bundles. I am quite satisfied about all that, and I can understand its being annoying, particularly because of the way in which it stamped the premises as business premises instead of residential. Nevertheless, if there were a right to carry on the business there, if that was not a breach of covenant, I do not think that the use of the stairs amounted to a nuisance in itself.

Then as to the vans. The principle as to when the use of a highway may become an actionable nuisance was laid down by LUXMOORE, J., as he then was, in *Vanderpant* v. *Mayfair Hotel Co., Ltd.* (10). He was there dealing with a complaint against the Mayfair Hotel by a plaintiff who lived in the close neighbourhood, and who was complaining of interference with his rights by the delivery vans, and also of noise coming from the kitchens. He says, at pp. 152, 153:

> . . . I think it will be convenient to state my view as to the law relating to the obstruction of a public highway, having regard to the rights of the public and those members of the public who occupy premises abutting thereon. Speaking generally, the public have the right of free and unobstructed passage over the whole of a public highway. The owner of premises abutting on a public highway is entitled to make a reasonable use of that highway for the purpose of obtaining access to his own premises, and of loading and unloading goods at his premises. But the right of the public is a higher right than that of the occupier, and if the user by the occupier, though reasonable so far as the particular business carried on by him is concerned, in fact causes a serious obstruction to the public, then the private rights of the occupier must yield to the public rights, and the court will interfere by restraining the continuance of the obstruction. In every case the answer to the question whether the public right has been interfered with must necessarily depend on the extent of the user; in other words, the question is always a question of degree.

Then he goes on to point out that that action was brought by a private individual, and not by the Attorney-General on behalf of the public. He continues, at pp. 153, 154:

> The plaintiff must therefore prove that he has been unreasonably obstructed by the defendant company, and that he has suffered particular damage; and
> A that that damage is direct and substantial. Has he succeeded in satisfying all those conditions? As I have pointed out, in each case the question to be determined is one of fact. The plaintiff claims that he has been obstructed in the access to his own house, and if the evidence is sufficient to establish that the defendant company has interfered substantially with the reasonable access to the plaintiff's house, then in my opinion the plaintiff will have satisfied the necessary conditions to enable him to maintain this action . . .

B The company had five vans and a car. The vans brought flowers from the market. They arrived early, at about 8.15 a.m. to 8.30 a.m. They would empty their load and take the empty boxes away again, and they were used during the day for making deliveries to the various customers. In theory, and I think to a great extent in practice, goods were taken
C down the steps to the left of the porch, and a van stopping opposite those steps would, of course, block the entrance to the porch. It was impossible for the vans to use South Audley Street at all. That was not permitted. The difficulty the company were in was that they had no place in which to park their vans, and their user of the highway certainly
D went far beyond mere loading and unloading. However, that would not give the plaintiff a cause of action unless it caused him particular damage beyond the general inconvenience suffered by the public. The particular damage relied on is that the defendants have interfered substantially with the plaintiff's access to the building—that is, that he or
E his wife has been continually prevented from driving up to the porch, and has been compelled to stop lower down the street.

On Nov. 1, 1938, Newman began to keep a diary recording what happened. By June 6, 1939, I find 22 entries recording an inability to get to the entrance—that is, 22 entries relating to a period of some 7 months.
F It is not very much. I am satisfied that he had cause to complain, and that it amounted at times to a nuisance, but I am not prepared to hold that an actionable nuisance has been established with regard to the vans. I do not think it amounted to a sufficiently substantial interference. LUXMOORE, J., twice emphasised that word "substantial." After the
G improvement which is admitted, I doubt whether it was sufficiently substantial interference to found an action based on nuisance.

As to the complaint of noise, I have no doubt whatever that that did amount to an actionable nuisance. There were two main sources of noise. First, the lift shaft, as I have said, was not outside the flats, but came
H up immediately under the end of the plaintiff's bedroom. Of course, it did not affect him while he was in bed, because the business stopped at 6 p.m., but during the day it was constantly at work, and these collapsible metal doors, which of course had to open and shut every time the lift was used, and the movement of the lift itself coming up under the floor of the flat, I am satisfied were a source of noise. Then there was the

banging of doors. There was the shop door, there was a door on every floor, and apparently the worst door of all was this fireproof door halfway down the stairs to the basement. They were fitted with springs, but not springs which controlled or checked them. There were two factors which helped noise to reach the plaintiff's flat. There was the lift shaft, which formed a tube which ran up through the whole building, and the borrowed lights running up the sloping part of the stairs on each floor let the noise from each side of the flats on to the staircase. I find that the continual banging of the doors was an inconvenience materially interfering with the ordinary physical comfort of human existence according to plain and sober and simple notions obtaining among English people. I use that language because it is in the leading case of *Walter* v. *Selfe* (18) and was quoted and applied by LUXMOORE, J., in *Vanderpant* v. *Mayfair Hotel Co., Ltd.* (10), at p. 165.

There are other matters upon which it is necessary to come to a decision. I have held that the corporation committed a breach of covenant in permitting the premises to be used for business purposes, and that they were responsible for the temporary nuisance from August to December. A temporary nuisance is not necessarily actionable. The principle has been laid down clearly, I think, in *Harrison* v. *Southwark & Vauxhall Water Co.* (11), and in *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd., and D'Allessandri* (12). In *Harrison* v. *Southwark & Vauxhall Water Co.* (11), VAUGHAN WILLIAMS, J., said, at pp. 413, 414:

> . . . it seems to me that if the defendants had without statutory authority sunk this shaft and done this pumping for any lawful and ordinary purpose in the exercise of their powers as private owners of the land they would not have been responsible as for a nuisance. It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next-door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance . . .

The point is that, if a man is doing something which he has a right to do, and causes a nuisance of a temporary kind, it is not actionable, but, if he is doing something which is unreasonable, and which he has not the right to do, he may then be guilty of a nuisance.

In *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd., and D'Allessandri* (12), again a flat case, on one of the floors there was a certain alteration being made, turning it into, or increasing its use as, a restaurant. BUCKLEY, J., in dealing with this question, said, at p. 375:

> That was not a reasonable use of the building. The question is whether he is liable for that, and in my opinion he is. I am not saying that the alteration was

> not such as he might properly make for the purpose of carrying on a restaurant, but that by so doing he was exposing his neighbour to a burden which he ought not to be called upon to bear. In *Ball* v. *Ray* (13), LORD SELBORNE, L.C., said [pp. 469, 470]: "In making out a case of nuisance of this character there are always two things to be considered, the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection." . . . I prefer to guide myself by the judgment of LORD SELBORNE, L.C., to the effect that the court must consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance; but if he is not using it reasonably, if he is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief.

If one applies those principles here, the nuisance was not caused by a lawful and proper exercise of their powers, but by an exercise which was in breach of their duty to the plaintiff, and I think, therefore, that the nuisance caused cannot be excused in the way which has been contended.

The next question is whether or not the corporation are answerable for the nuisance caused by the running of the business. They are certainly responsible for the nuisance in so far as it is attributable to the lift, but I do not think that they can be held responsible for the banging. It is clear that, if the company had taken the proper steps, that trouble could have been eliminated. It was said that there is no difficulty about it at all, and the corporation would not be responsible, I think, for the vans. On the whole, I do not think I ought to find that they are parties to the nuisance caused by the way in which the business has been conducted.

Then comes the question whether or not the company are bound by the implied covenant not to use these flats for any but residential purposes. This is a very important question, because the granting of an injunction must depend on the answer to it. Secondly, there comes the question whether or not they are liable on the implied covenant not to derogate from the grant to the plaintiff. I will deal with the latter question first. It is clear that the company are bound by this covenant equally with the corporation. Indeed, that was admitted. Has there been a breach of it, and, if so, by whom? I have considered *Dare* v. *Bognor Urban District Council* (14), *Browne* v. *Flower* (15), *Harmer* v. *Jumbil* (*Nigeria*) *Tin Areas, Ltd.* (16) and *O'Cedar, Ltd.* v. *Slough Trading Co.* (17). I accept, of course, the test suggested by PARKER, J., that the acts complained of must make the demised premises materially less fit for the particular purpose. The surrounding circumstances must be looked at, and, on the whole, I am satisfied that the corporation broke this covenant by the nuisance for which they were responsible from August to September, and I am satisfied that the company broke it by the nuisance for which they were responsible from towards the end of Nov., 1938, until Sept., 1939.

I am quite satisfied that at both those periods the premises were rendered materially less fit for the particular purpose for which they were demised.

Finally, then, I have to deal with the question of the company's liability on the restrictive covenant as to user. They can only be bound by this covenant if they took their demise with notice of it in the way defined by the Law of Property Act, 1925, s. 199, which provides as A follows:

> (1) A purchaser [including a lessee] shall not be prejudicially affected by notice of—(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof; (ii) any other instrument or matter or any fact or thing B unless—(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. C

The company and their solicitors and agents, or at any rate the company, knew that this building, apart from their shop, had been used for residential purposes. I think that they must have known that it had always been so used, or at any rate for a very long time. Mrs. Spry D herself went over the building and saw how it was adapted only for residential purposes. Norfolk & Prior gave the company full particulars of the position in Aug., 1937, when the flats were all occupied for residential purposes, and in the evidence there is an account of Mrs. Spry's inspection, and the questions she asked and what she was told. Later E in the evidence, there is a letter from Messrs. Claude Leigh (Management), Ltd., who are the agents of Flower Decorations, Ltd. They speak of them as their clients, and they say they have had an opportunity of discussing it with their clients, Flower Decorations, Ltd., and they make a firm offer. Then this passage occurs:

F

> . . . bearing in mind that they would be letting the entire premises to an established tenant for a long term and that they would in addition be passing over their liability for staircase lighting and cleaning as well as the provision of a certain amount of service, which is always necessary where a building is let as separate flats.

Then there is a letter which is written by Flower Decorations, Ltd., G to the clerk of the council, the whole point of the letter being that they knew that the building was used for residential purposes, and knew that permission had to be obtained for a change of user. There is just this sentence: "Hitherto these have been used as four separate flats." Later, their solicitors write to Messrs. Ashurst, Morris & Crisp H asking certain questions about Newman's lease. They ask who is responsible for furnishing the staircase, and to whom the carpet and stair rods belong:

> Has the tenant of the flat any and what facilities for storing coal? Have any regulations been made by your clients in regard to the management of the building as referred to in cl. 1? . . .

Later in the evidence, a firm of agents writes to the council as follows

> On behalf of my clients Messrs. Flower Decorations I beg to make application to your council . . . for the change of user. At present these three floors are let as flats.

It seems to me that the company, and their advisers knew all the essential facts raising the presumption that there was—or, at any rate, might be—a scheme for using the flats on the first, second and third floors for residential purposes only. I am satisfied that they should have inquired, that they could have inquired, and that it was only reasonable to inquire, about this. The existence of such a thing as a scheme applicable to flats must have been known to the company's solicitors, and it seems to me that very little consideration would have satisfied them that there was. When they read Newman's lease, they must have seen that the lease itself contained a scheme of management, and they knew of the other leases. They could have asked to see them. They could have asked to see if these restrictions found a place in these other leases as well, and, if they had given their minds to it, as they ought to have done, they must have been satisfied that they were doing something inconsistent with the scheme.

It is argued by counsel for the company that, notwithstanding the fact that his clients may have had notice—I do not mean that he admitted that they had notice, but, even if they had had notice—his clients are not bound by the covenant, because it was not registered. He relies on the first part of the Law of Property Act, 1925, s. 199, and says that, if the company has taken with notice of the covenant and it is not registered, then they are not bound by it even though they had notice of it. That section does not refer to the Land Registration Act, 1925, but I will read the Land Registration Act, 1925, s. 50, because there are two quite distinct systems of registration, as far as I can make out—namely, registration of title under the Land Registration Act, 1925, and registration of charges under the Land Charges Act, 1925. At any rate, the Land Registration Act, 1925, s. 50, begins as follows:

> (1) Any person entitled to the benefit of a restrictive covenant or agreement (not being a covenant or agreement made between a lessor and lessee) with respect to the building on or other user of registered land may apply to the registrar to enter notice thereof on the register. . . .

Then the Land Charges Act, 1925, s. 10, provides as follows:

> (1) The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges. . . .

Then Class D includes in para. (ii):

> A covenant or agreement (not being a covenant or agreement made between a lessor and lessee) restrictive of the user of land entered into after the commencement of this Act. . . .

Prima facie, of course, this covenant is not registrable, because both these covenants are covenants between a lessor and a lessee, but it is said that, if one lessee under a building scheme is being sued by another lessee under the scheme, the covenant on which he is being sued is not a covenant between lessor and lessee, and is, therefore, registrable. Well, all I need say is that the company is not being sued as a lessee of one of the flats, but is being sued as owner of the leasehold reversion bound by the late lessor's covenants, and these covenants are not capable of registration.

To what relief is the plaintiff entitled ? Both the defendants are answerable for the breach of the implied covenant not to use the first, second and third floors for other than residential purposes or so as to annoy the plaintiff. I cannot grant an injunction against the corporation. They have parted with their interest in the reversion. However, I can and ought to grant an injunction restraining the company for the duration of the plaintiff's lease from using the first, second and third floors for other than residential purposes and from carrying on their business on the ground floor and basement so as to create a nuisance by noise to the annoyance of the plaintiff. I accept the evidence that, with a business being carried on in the rest of the building, the flat would be worth substantially less than under the old conditions. I award £40 damages against both defendants for the breach of the covenant as to user, and I have considered under that head only the annoyance and inconvenience caused which were inseparable from the carrying on of the business on those premises. I award £15 against the corporation for the nuisance caused by them from August to December and/or for that breach of the covenant not to derogate from the grant. I do not mean that I award it twice over, but I award the £15 both because the matter in respect of which I award it was a common law nuisance and because it was also a breach of the covenant not to derogate from the grant. I award the sum of £25 against the company for the nuisance caused by them by noise from the end of November until the trial of the action, really until the end of August, and I mean by that to cover all the period and/or for that breach of covenant not to derogate from the grant. The plaintiff must have his costs of the action against both defendants.

Judgment for the plaintiff with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiff) ; *Ashurst, Morris, Crisp & Co.* (for the first defendants) ; *Edwin Coe & Calder Woods* (for the second defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PITCHERS, LTD. *v.* PLAZA (QUEENSBURY), LTD.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 15, 1939.]**

A *Arbitration—Application to stay legal proceedings—Action on contract containing an arbitration clause—Opposition to summons under R.S.C., Ord.* 14, *for leave to sign judgment—Affidavit filed and appearance before master—Whether a step in the action—Arbitration Act,* 1889 (*c.* 49), *s.* 4.

B The plaintiffs sued the defendants by a specially indorsed writ for £3,236 2*s.* 1*d.*, which they alleged to be due to them under a building contract. The contract included an arbitration clause, to be operative on either party forthwith giving to the other notice of any dispute or difference. The plaintiffs took out a summons under R.S.C., Ord. 14, for leave to sign final judgment. The defendants filed an affidavit, and appeared before the master claiming that they had a defence to the action. On the master's giving leave to sign judgment, the defendants appealed against his order, and only then applied for a stay of the action by reason of the arbitration clause included therein :—

C HELD : (i) the defendants were precluded from relying on the arbitration clause as they had taken a step in the action when they opposed the summons for leave to sign final judgment before the master.

D (ii) *per* GODDARD, L.J. : no step is taken in the action by a defendant opposing a summons under R.S.C., Ord. 14, who not merely raises the matter of the arbitration clause in his affidavit, but also at the same time takes out a summons to stay the action.

E [**EDITORIAL NOTE.** To preserve a right to arbitrate it is essential that no step shall be taken in the action before an application is made to stay it. The position of a defendant when the usual procedure on R.S.C., Ord. 14 is followed is that he must take out a summons to stay before the summons for judgment comes on for hearing. It would appear from the judgment of GODDARD, L.J., that he may, if he so desires, file the usual affidavit in answer to that of the plaintiff, presumably asking for leave to defend if his application to stay is refused.

AS TO STEP IN ACTION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 639, 640, para. 1087 ; and FOR CASES, see DIGEST, Vol. 2, pp. 375, 376, Nos. 395-408. See, also, YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 2193, 2194.]

F Case referred to :

(1) *Allied Artists Corpn.* v. *Jacobson* (1922), July 7, Unreported.

APPEAL by the defendants from an order of ASQUITH, J., dated Nov. 14, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

G *Stephen Chapman* for the appellants.

H. St. John Field, K.C., and *Gerald Gardiner* for the respondents.

SLESSER, L.J. : In this case, Pitchers, Ltd., are suing Plaza (Queensbury), Ltd., for £3,236 2*s.* 1*d.* which is said to be :

H
> The amount due to the plaintiffs by the defendants for work and labour done and materials supplied as per architect's certificate, dated Sept. 8, 1939, issued pursuant to a building agreement dated Apr. 12, 1937, and made between the defendants of the one part and the plaintiffs of the other part.

The writ is specially indorsed, and claims the sum due on the architect's certificate, dated Sept. 8, 1939—namely, the sum of £3,236 2*s.* 1*d.*

The agreement which is mentioned in the writ is dated Apr. 12, 1937, and is between the plaintiffs and the defendants. It is not necessary to consider it in any detail, but it is an agreement for the construction of the superstructure of a cinema. It contains a clause (cl. 25 (*f*)) which provides as follows :

> A Upon expiration of the defects liability period stated in the appendix or if no period stated then within 6 months after completion of the works or upon completion of making good defects under cl. 13 hereof, whichever is later, the architect shall issue a final certificate of the value of the works executed by the contractor and such final certificate save in cases of fraud, dishonesty or fraudulent concealment relating to the works or materials or to any matter dealt with in the certificate and save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed shall be conclusive evidence as B to the sufficiency of the said works and materials and of the value thereof.

As I have said, that certificate was dated Sept. 8, 1939.

Upon that, there was a specially indorsed writ, and there was the usual affidavit in support, and an affidavit was sworn on behalf of the defendants asking that final judgment should not be signed. The affidavit was C sworn on Oct. 18, 1939, and in it one Wingate says that the work is not in accordance with the priced schedule, that the quantities of certain of the materials are not correct, and that there is a defence to the action. Then there is an allegation as follows :

> D The plaintiffs' account which took 16 months to prepare and which the defendants did not have an opportunity of considering until June or July of this year [1939] involves investigation of a large number of complicated factors and on Aug. 11, 1939, I wrote to Mr. Cecil Masey the architect named in the building agreement that the account would be disputed and accordingly the said architect was not entitled to give the final certificate on which these proceedings are based. In the circumstances a dispute having arisen the provisions of the said building agreement for a reference to arbitration are operative and in particular cl. 26 (*b*) is applicable. E

I shall have to refer to cl. 26 (*b*), so I will read it now :

> Provided always that in case any dispute or difference shall arise between the employer and the architect on his behalf and the contractor, either during the progress or after completion of the works or after the determination, abandonment, or breach of this contract, as to the construction of this contract or as to any matter F or thing arising thereunder. . . . or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of. . . . But the defendant if so advised would be willing for the action to be referred to the official referee.

The master, on the matter coming before him, gave leave to sign final G judgment. An appeal was subsequently entered, but, probably by an oversight, there was no application to the master for a stay of execution until the hearing of the appeal, and in fact execution immediately took place. A further application was then made to the master to stay that execution, which was ordered upon terms. All these matters proceeded, H as it seems to me, solely upon the question as to whether or not judgment should be signed under R.S.C., Ord. 14, the defendants maintaining that they had a defence to the action, and, up till the time when the matter came before the judge, no application to stay the action in accordance with the Arbitration Act, 1889, s. 4, had ever been made, and, beyond a

vague reference in an affidavit of one Greathead, no specific request had ever been made to grant a stay. When the matter came before the judge—as we are told, upon the judge's own suggestion—leave was given to apply to stay the action in the proper form, and that matter was before the judge on the adjourned hearing, together with the original
A appeal against the decision of the master giving leave to sign final judgment.

We are told that in dealing with this matter the judge refused the appeal so far as relates to the application to stay the proceedings, but he did give leave to defend the action. As to that leave to defend the
B action, and the order that it should be entered in the short cause list, there is no complaint by counsel for the respondents in this court, but there is an appeal before us on behalf of the defendants asking us to hold that the judge was wrong and that the whole action should have been stayed under the arbitration clause. That is really the matter which
C is before us, and that question depends in part upon the problem whether in this matter the defendants have not taken a step in the action and so precluded themselves, according to the general principles, from raising this matter. Secondly, there arises the question whether, in the circumstances of this case, they have ever complied with the requirements of
D the arbitration clause of the building agreement at all, so that, even if the matter were open to them, they could satisfy the court that they were entitled to their stay. The second point, which I may describe perhaps as the question of greater merit, seems to me to be a good one, as taken here by the respondents. It is said: "You never have given that
E notice which is required by cl. 26 (*b*) of the building agreement to refer the matter to arbitration." The first thing which one has to observe is that the obligation is that the party "shall forthwith give to the other notice." The only possible letter which can be relied on as constituting a notice—and it is one which was never read to the judge, and which I
F read now with grave doubts as to whether, in any case, the appellant here is entitled to use it—is one dated Sept. 28, 1939. That letter was written many months after the dispute originally arose, and it seems to me quite impossible to say that that letter, dated Sept. 28, 1939, which was just before the writ in this action, dated Sept. 30, 1939, can possibly be a notice
G forthwith given to the other side. It is the only letter which can possibly be said in any event to comply with the obligation of the clause, as it does say:

> We take this opportunity of giving formal notice to that effect.

H The letter is from the solicitors to the defendants, and they say, and say truly:

> Our clients have already intimated to the architect that they intended to invoke the arbitration clause.

There is a certain amount of want of precision in all the proceedings of the defendants in this case, and everything seems to have been done in

a very, I will not say evasive, but indeterminate manner. It is true that there were written to the architect certain letters, to which we have been referred, which do vaguely refer, if I may say so, to the arbitration clause, but in any case they do not avail the defendants in this action, A
because the requirement of cl. 26 (*b*) is that they shall forthwith give to the other party notice, and they are not notice to the other party. However, this is the sort of passage which is said to constitute a notice to the architect, who is to be the agent for the other party, and so would comply with the requirements of the clause. This is Wingate writing on B
Aug. 11 as follows:

> **As far as I can see at the moment the matter will have to be decided by arbitration in accordance with the contract.**

Even if such a notice had been given to the other side, I think that it would be far from being a notice within the meaning of the clause. It C
is a mere intimation of something which may or may not happen. However, as I say, it never was given to the other side, and, in my opinion, for the reasons I have stated, even had the defendants succeeded in showing that they were entitled to raise this matter, not having taken another step in the action, they would have failed before the judge on D
that point in any event.

The substance of this case, however, has been perhaps argued rather more upon the basis that the defendants here have taken a step in the action. I entertain myself no doubt whatever that they took a step in the action when they appeared before the master and asked for leave E
(to quote their affidavit) to defend the action. It is true that there may be difficult cases where an application to stay is made at the same time as leave is asked to defend, upon which I do not propose, for myself, to pass judgment in this case, and where there may be a question as to whether or not those two matters, taken together, would constitute such F
a step in the action as to preclude the defendants from relying upon their request for a stay. Here, however, one has an entirely different case. One has a summons under R.S.C., Ord. 14, for final judgment, and one has an affidavit in support of leave to defend the action, with a vague intimation that they might not object, as appears in one of the affidavits, G
to the matter being referred in the action to the official referee. It is only when the matter comes before the judge that the judge, not in order to preclude the argument of counsel for the respondents whether this was a step in the action, but so as to have everything before him, says: "*De bene esse*, you may now take out a summons for a stay." In truth H
and in fact, however, a step in the action was taken when the summons to sign final judgment was answered by affidavit, and no application was made to stay the action on the ground of the arbitration clause. They had the appeal following. The whole case seems to me to have been one where the defendants persistently took steps in the action—not one step but several steps—and finally, among other things, they asked for and received a favour in the action of being given leave to defend the

action. In these circumstances, it seems to me impossible to say that there was no step taken in this action. For both these reasons, I think that the judge was right, and, now that we understand really what is left of this case, I think also that he was right in ordering it to be tried in the short cause list.

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MACKINNON, L.J.: I agree. Eventually there was an application by the defendants on Nov. 10 by summons to stay the action pursuant to the Arbitration Act, 1889, s. 4. It is a condition of the right of any party to take advantage of that section that he shall make such application before taking any other step in the proceedings. I am quite clear that in this case the defendants had not complied with that condition. However, there is a further aspect of it. The making of any order under the Arbitration Act, 1889, s. 4, is in the discretion of the court, and, by the terms of the section, the judge is directed to act under it only if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. Having heard something of the merits of this case as disclosed in the correspondence, I am not only not satisfied that there is no sufficient reason why it should not be referred, but also I am completely satisfied that there is every reason why it should not be referred. In those circumstances, I think that the order of the judge was perfectly right, and the appeal must be dismissed.

B C D

GODDARD, L.J.: I agree, and desire to associate myself with what MACKINNON, L.J., has just said as to the reason why this action should not be referred. For myself, I think that, when an employer reserves the advantage in a building contract of appointing his own architect, who is there to certify, and, in certifying, to protect his interests, and when one knows how much he is in fact at the mercy of the architect, and when one finds that the architect and the employer are disputing the certificate, the court should be very slow to take a step which simply means that the builder is going to be kept out of his money for a long time, as, of course, is the case if it is a proper case to go to arbitration, where innumerable items may be gone into, although the architect may have said that his client requires only to be satisfied that he ought to pay.

E F G

The only other thing which I want to say is that THE ANNUAL PRACTICE, 1940, p. 2502, states as follows:

> In *Allied Artists Corpn.* v. *Jacobson* (1), it was held that where, on a summons for judgment under R.S.C., Ord. 14, the defendant had filed an affidavit disputing the claim and claiming the right to submit the dispute to arbitration, he had not taken a step in the action, but as the defendant had alleged fraud in his affidavit, a stay was refused.

H

For myself, I should say that that is a somewhat dangerous passage to follow. In the first place, as the stay was refused on the ground that the defendant had alleged fraud, any view which the judge may have expressed as to whether or not the affidavit was insufficient to justify a stay is in the nature of an *obiter dictum.* The position was that, as the defendant alleged fraud, a stay had been refused. For myself, I am not at all satisfied that, if the defendant filed an affidavit in answer to an application for judgment under R.S.C., Ord. 14, although he may raise the arbitration clause, it may not be said that he has taken a step in the action unless at the same time he has taken out a summons to stay the action. Of course, if he has taken out a summons to stay the action which comes on (as, in the ordinary course, it would) at the same time as the summons for judgment, and the master refuses the application to stay, and says, " On the plaintiff's summons, I give judgment," I should say that there could be no doubt that, in appealing against both the refusal of the master to stay and the order giving leave to sign judgment, the defendant is not taking a step in the action. He has done what he can, by taking out the summons to stay, to get the action referred. If the master has refused that, and the defendant goes to the judge on that, he must at the same time, of course, also go to the judge and say : " Set aside the judgment, because, if this had gone to arbitration, it would follow that the master would not have given judgment." I myself feel great doubt as to whether, if Swift, J., did say what he is reported to have said, it is right. It seems to me that, if a defendant who is sued wants an action stayed, he should take out a substantive application at the earliest possible moment.

Appeal dismissed with costs.

Solicitors : *Morrish, Strode & Searle* (for the appellants) ; *Wylie, Patterson & Herring* (for the respondents).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*]

BISMAG, LTD. *v.* AMBLINS (CHEMISTS), LTD.

[Chancery Division (Simonds, J.), **December 8, 11, 21, 1939.]**

Trade Marks—Infringement—Use of mark in relation to plaintiffs' goods—Use as trade mark—Use as importing reference to plaintiffs' goods—Trade Marks Act, 1938 (c. 22), *ss.* 4, 68 (1).

The plaintiffs were the registered proprietors of the trade mark " bisurated " in respect of certain chemical preparations. The defendants were manufacturing and retail chemists who, in the course of their business, issued advertising circulars the lefthand columns of which contained the words " bisurated magnesia " followed by an enumeration of its ingredients, while the righthand columns contained an enumeration of the ingredients of the defendants' own preparation. There followed in each column the price of the respective preparations, the price of the defendants' preparation being considerably lower than that of the plaintiffs' " bisurated magnesia " preparation. The obvious implication was that, although the ingredients were exactly the same, the plaintiffs' preparation was less advantageous to prospective customers. On these facts, the plaintiffs alleged infringement of their trade mark " bisurated," and contended that the defendants had, contrary to the Trade Marks Act, 1938, s. 4, used their trade mark in relation to the plaintiffs' goods, and that such use was " use as a trade mark," or, failing that, use as "importing a reference to" the plaintiffs' goods. There was a further allegation of passing off the plaintiffs' goods by using the word "Bismag," which was the name of the plaintiff company. This allegation was not disputed :—

HELD : as the defendants had used the plaintiffs' trade mark in relation to the plaintiffs' own goods, there was no infringement under either head of the Trade Marks Act, 1938, s. 4 (1) (*a*) (*b*).

[**EDITORIAL NOTE.** The new Trade Marks Act of 1938 introduced a number of changes in the law relating to trade marks, and it is open to a trader to say that his goods are the same in quality as, but cheaper than, those of the owners of the trade mark. That he could do so under the old law was, in effect, decided by the House of Lords in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1), and it is now held that the law has not been altered in this respect, so far as the infringement of a trade mark is concerned.

AS TO INFRINGEMENT AND EXCLUSIVE USER, see HALSBURY, Hailsham Edn., Vol. 32, pp. 587, 588, para. 895 ; and FOR CASES, see DIGEST, Vol. 43, p. 220, Nos. 646-655.]

Case referred to :

(1) *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1934), 103 L.J.Ch. 106 ; Digest Supp. ; 150 L.T. 402 ; 51 R.P.C. 110.

ACTION for infringement of trade mark and passing off. The facts are fully set out in the judgment.

R. E. Burrell, K.C., and *James Mould* (for *R. A. B. Shaw* on war service) for the plaintiffs.

B. L. A. O'Malley for the defendants.

SIMONDS, J. : The plaintiffs, who carry on the business of the manufacture and sale of medicinal preparations, are the registered proprietors of trade mark No. 340,411, registered as of Feb. 20, 1912, in Class 3, Sched. III, in respect of "a medicinal stomachic powder for human use," and of trade mark No. 561,459, registered as of July 11, 1935, in the same class, in respect of "chemical substances prepared for use in medicine and pharmacy." Each of the trade marks consists of the word "bisurated." The defendants also carry on the business of the manufacture and sale of medicinal preparations. They sell preparations, not only of their own manufacture, but also of other manufacturers, including the plaintiffs.

This action is brought, first, to restrain infringement of a registered trade mark, thereby raising a question of general importance under the Trade Marks Act, 1938, and, secondly, to restrain passing off at common law.

The infringement of trade mark of which the plaintiffs complain is in a pamphlet issued by the defendants. There have been more than one edition of this pamphlet. For the purpose of this case, I will take the edition of which a specimen was exhibited in evidence. The earlier edition appears to have been superseded, and the defendants do not threaten or intend to issue it. This pamphlet has been prepared with some care in such a manner as will, if its author's hopes are fulfilled, escape the consequences of the Trade Marks Act. It opens with an attack upon patent medicines as follows:

> Some plain truths about patent medicines. Read the enclosed and you will save yourself money. Safeguard your health and be much happier as thousands of other people have proved for themselves by taking Amblins' famous medicines. For too many years have sufferers been exploited by manufacturers of branded medicines and charged shillings for medicines which cost pence to make. A

Then follows these words in large type:

> Amblins' guaranteed prescriptions are now to be obtained in 6*d*., 1*s*., and 2*s*. sizes.

In the body of the pamphlet, there is much more in the same vein. It is B pointed out that many of the much-advertised medicines are made according to well-known formulæ, that millions of pounds are spent in advertising them, that every penny spent in advertising is paid for by a credulous public in the form of exorbitant prices, and that precisely the same article can be supplied by the defendants at a very much lower C price. The final exhortation is as follows:

> If you want the original advertised remedies, we can supply them to your order at the full prices. If you want Amblins' remedies, order by number or by Amblins' own name.

This is followed by some pages in which are set out in two columns, the D left headed "List of advertised patent medicines sold by us," and the right headed "Amblins' Medicine (Brand) Prescriptions," first, some well-known branded medicine with its analysis or ingredients and prices, and then, immediately opposite to it, under a prescription number, the defendants' corresponding preparation, usually with a description or E fancy name, but sometimes only with a number, and having also usually an identical analysis or statement of ingredients and a statement of price, which is in every case lower, and often very much lower, than that of its opposite number. In the particular case of the plaintiffs' preparation, the lefthand column reads as follows: F

> Bisurated Magnesia Tablets. Analysis: Bismuth Carb. Soda Carb. Magnesia Carb. Excipient. Price, 1*s*. 3*d*. for about 50 tablets.

The righthand column reads as follows:

> Prescription No. 7 Bismuthated Magnesia Tablets. Analysis: Bismuth Carb. Soda Carb. Magnesia Carb. Excipiont. Price, 30 tablets, 6*d*., 75 tablets 1*s*. G

The plaintiffs' preparation in powder instead of in tablets is similarly treated.

This is the alleged infringement of the plaintiffs' trade mark "bisurated." It will be noted that the defendants do not by any means H seek to describe goods of their own manufacture by the plaintiffs' mark. On the contrary, they emphasise the distinction between their own and the plaintiffs' goods, saying in effect to the public: "You can have the plaintiffs' goods or ours. Ours are just the same as theirs, and are much cheaper." The plaintiffs complain that the defendants are deliberately taking advantage of the publicity which extensive advertisement of bisurated magnesia has gained in order to sell their own goods, and claim that thereby their statutory right has been infringed. I do not doubt that the defendants get the benefit of the plaintiffs' advertisement. It is not my province to say whether there is any impropriety in such a course. I am concerned only to determine whether the plaintiffs' statutory rights under the Trade Marks Acts, 1938, s. 4, have been invaded. I must, however, observe that the right now claimed is something very different from the protection previously given to trade marks by statute or by common law. It was not inaptly described by counsel for the plaintiffs as being something akin to a limited form of copyright. It is a claim which, if it is valid, must have far-reaching consequences. I see, indeed, no limit to the interference with trading, heretofore counted legitimate, which its assertion might not cause. Nor is there any logical reason why this new form of protection should be accorded to trade marks rather than to all forms of advertised goods. If the assertion by a maker of stout that his product is as good as Guinness's stout but cheaper, or by a maker of soap that his product is as good as Pears' soap but cheaper, is an attack from which the proprietors of these widely-advertised goods ought to be protected, it is a wholly irrelevant consideration whether any part of the name "Guinness's stout" or "Pears' soap" is a statutory trade mark. If such a right is, for the first time, to be annexed to a trade mark, it must, in my judgment, be created by clear words.

It is necessary for the consideration of this question that I should look back to the earlier law. By the Trade Marks Act, 1905, s. 3, a trade mark was defined as a mark:

> . . . used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale . . .

By sect. 39, the rights of the registered proprietor of a trade mark are thus defined:

> Subject to the provisions of sect. 41 of this Act and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade mark shall, if valid, give to such person the exclusive right to the use of such trade mark upon or in connection with goods in respect of which it is registered . . .

This being, under the then-existing law, the statutory right of a registered proprietor of a trade mark, in 1934 *Irvings' Yeast-Vite, Ltd.* v. *Horsenail* (1) was decided. In that case, the plaintiffs, the registered proprietors of a trade mark "Yeast-Vite," brought an action against one Horsenail (trading as the Herbal Dispensary) to restrain an alleged infringement of their trade mark, which consisted of a sale by the defendants of their own wares under the label: "Yeast Tablets, a substitute for Yeast-Vite." The defendants, justly thinking, perhaps, that the matter was too clear for argument, did not appear at any stage of the proceedings, in the course of which it was unanimously held by BENNETT, J., the Court of Appeal, and the House of Lords, that there had been no infringement. Two passages from the opinion of LORD TOMLIN in the House of Lords may be cited. LORD TOMLIN, said, at p. 110:

> This is clearly a use of the word "Yeast-Vite" on the respondent's preparation to indicate the appellant's preparation and to distinguish the respondent's preparation from it. It is not a use of the word as a trade mark, that is, to indicate the origin of the goods in the respondent by virtue of manufacture, selection, certification, dealing with or offering for sale. A

Later, LORD TOMLIN said, at p. 110:

> The phrase "the exclusive right to the use of such trade mark" carries in my opinion the implication of use of the mark for the purpose of indicating in relation to the goods upon or in connection with which the use takes places, the origin of such goods in the user of the mark by virtue of the matters indicated in the definition of "trade mark" contained in sect. 3. B

In this state of the law, a departmental committee, appointed by the President of the Board of Trade, in 1934 made a report on the law and practice relating to trade marks. I was invited to look at this report, and did so, for the purpose of learning the state of the law—a matter C upon which I was better able to inform myself from other sources—and the supposed defects in it. I declined to consider what proposals or recommendations the committee made. That appears to me to be a wholly illegitimate method of approach to the construction of an Act of Parliament. Whether and to what extent Parliament thought fit D to remedy the supposed grievances of owners of trade marks must depend on the true meaning of the Act of 1938, in the interpretation of which I cannot be guided by what the committee thought should be done.

The Trade Marks Act, 1938, introduced numerous changes into the E law. A new definition of trade mark is to be found in sect. 68 (1) as follows:

> . . . "trade mark" means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, F whether with or without any indication of the identity of that person . . .

The first difference between this definition and the earlier definition is the substitution of the words "in relation to" for the words "upon or in connection with." I do not think that a different meaning can be attached to the different words. The second difference is in that which G the mark indicates. In the earlier definition, the mark indicated in effect the origin of the goods. In the later definition, it indicates a "connection in the course of trade between the goods and some person." This difference may have been necessitated by some of the changes introduced into the law, particularly in regard to assignment of trade marks. It H cannot, in my judgment, have any bearing upon the essential nature of a trade mark. I turn then to sect. 4, which takes the place of sect. 39 of the Act of 1905, and enacts what are the rights given by registration. So far as relevant, it provides as follows:

> (1) Subject to the provisions of this section, and of sects. 7 and 8 of this Act, the

> registration . . . of a person . . . as proprietor of a trade mark . . . in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods, and without prejudice to the generality of the foregoing words, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it . . . in the course of trade in relation to any goods in respect of which it is registered and in such manner as to render the use of the mark likely to be taken either (*a*) as being use as a trade mark; or (*b*) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade . . . (3) The right to the use of a trade mark given by registration as aforesaid shall not be deemed to be infringed by the use of any such mark as aforesaid by any person (*a*) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark . . .

I do not think that I get any assistance from any other sections of the Act. The question arises on the true construction of sect. 4 alone whether or not the statutory right of the proprietor of a trade mark has been enlarged so as to make that an infringement which, under the old law, would not have been an infringement. That this is so is the contention of the plaintiffs' counsel, who submit that the *Yeast-Vite* case (1), if it had to be decided under the new law, would have to be decided in favour of the plaintiff company.

I have already expressed the view that a "trade mark," under the new law, is what it was under the old law—so far, at least, as the questions raised in this case are concerned. It does not, however, follow that the statutory right of the owner of that form of property may not be very different. The language of sect. 4 is involved and difficult to construe. If subsect. (1) had stopped at the words "in relation to those goods," there would be little difficulty. So far, there is little difference between the language of sect. 4 and that of the old sect. 39, and it would not have been possible, in my judgment, to hold that any larger right had been created by the new Act than by the old. I could have come to no other conclusion (taking the facts of the present case) than that the user of the word "bisurated" by the defendants would not be an infringement of the plaintiffs' trade mark, unless it indicated goods as originating from, or connected in the course of trade with, the plaintiffs, when in fact they did not so originate or were not so connected. This seems to me as clear as was the meaning of the old sect. 39. The subsection, however, proceeds to particularise what is to constitute an infringement of the exclusive right created by its earlier words. This part of the subsection is introduced by the words "Without prejudice to the generality of the foregoing words," and these words, while apt to introduce some right or privilege in regard to which there might be some doubt as to its falling within the ambit of the general words, are infelicitous, if they preface the creation of a right, which could not, upon any fair reading of the general words, be carried by them, and which, as

I have already observed, is something very different from any form of privilege or protection previously given by statute or common law to the owner of a trade mark.

The claim in the present case is that the defendants have used an identical mark—namely, "bisurated"—in the course of trade "in relation to" goods in respect of which it is registered and in such manner as to satisfy the conditions of either subcl. (*a*) or subcl. (*b*), the words of which need not be repeated at this stage. It is first to be observed that two conditions are to be fulfilled. First, the word "bisurated" must be used "in relation to" goods in respect of which it is registered. Secondly, it being user in relation to such goods, it must be used in such manner as to fall within subcl. (*a*) or subcl. (*b*). First, then, have the defendants used the mark "bisurated" in relation to any goods in respect of which it is registered? Clearly, they have. They advertise the sale of the plaintiffs' goods, "bisurated magnesia." Is it, then, in relation to those goods or to some other goods that they use the mark? Clearly, it is in relation to those, the plaintiffs', goods that they use the mark. It is true that in the same advertisement they offer to sell their own goods, "bismuthated magnesia," and that their offer is in immediate juxtaposition to the advertisement of the plaintiffs' goods, but it does not seem to me a fair use of language to say that the mark "bisurated" is used "in relation to" the defendants' goods any more than the word "bismuthated" is used in relation to the plaintiffs' goods. If the true construction is that the word "bisurated" has been used by the defendants only in relation to the plaintiffs' own goods, they are protected by subsect. (3). In my judgment, the plaintiffs do not establish that the defendants have satisfied the first condition of infringement.

It is possible, however, that what appears to be the plain meaning of the first sentence of that part of the subsection which I am considering may be displaced by the necessary implication of the latter part of it, so that, reading the subsection as a whole, I must conclude that the words "in relation to any goods" have a wide meaning, and that (to proceed from the general to the particular) the word "bisurated" in the defendants' pamphlet is used in relation to the defendants' goods as well as to the plaintiffs' goods, in which case the defendants would not get the benefit of subsect. (3). I turn then to the second condition in subsect. (1). It is couched in such difficult language that one may well hesitate to say that it has any very clear implication. First, one must consider subcl. (*a*), and ask: "Is the use of the mark such as to render it likely to be taken as being use as a trade mark?" If I understand the plaintiffs' contention, they do not say that the defendants' use of the word "bisurated" is "likely to be taken as being use as a trade mark." Truly, one may pause to wonder at an enactment which, for the protection of a trade mark, appears to prohibit the use of a mark, not only as a trade mark, but also as something else. To this, however, the subdivision into subcl. (*a*) and subcl. (*b*) necessarily points, and it is, no doubt, upon this that the plaintiffs rely as an answer to the general criticism upon the nature of their claim, which appears in the earlier part of my judgment. I read once more the relevant words:

> . . . that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark . . . uses a mark identical with it . . . in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either (*a*) as being use as a trade mark; or (*b*) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

In relation to the facts of the present case, the question may be put thus: "Does the use by the defendants of the word 'bisurated' in their pamphlet constitute a use by them of the mark in relation to goods in respect of which it is registered in such manner as to render the use of the goods likely to be taken as a reference to the plaintiffs' or their goods?" When that question has been put and answered, the question whether the defendants are protected by subsect. (3) still remains. To me, having read and re-read the subsection, the answer still seems plain. I can find nothing in it which allows, much less compels, me to say that the user of the mark "bisurated" by the defendants is in relation to anything but the plaintiffs' goods. It is quite true that the mark is used, and that it is used in relation to goods in respect of which the mark is registered—that is, it is an advertising circular issued to the public—and that it imports a reference to the plaintiffs, but all those conditions may be fulfilled and yet, if the user is in relation to the plaintiffs' own goods, as, in my judgment, the user here clearly is, there is no infringement, for the user is protected by subsect. (3). If this is the construction to which I must otherwise come, I do not think that I must allow myself to be driven from it by the difficulty of finding a case which is covered by subcl. (*b*) and not by subcl. (*a*). It may well be that there are such cases, though they do not occur to me. If the plaintiffs' contention is right, a chemist will be liable to an action for infringement if in one part of his shop window he exhibits the plaintiffs' bisurated magnesia and in another the defendants' bismuthated magnesia, with a statement of its contents and its price upon each. Nor would any stores venture to catalogue under the same and appropriate heading rival preparations for the cure of some common ill, lest the owner of either preparation should say that the name of his preparation was in whole or part protected by a trade mark and that the trade mark was infringed by the mention of the other preparation in its immediate neighbourhood. No test is available by which it can be determined whether, in such a case, there is, in relation to any other than the plaintiffs' own goods, a user which imports a reference to the plaintiffs or their goods. I must decline, unless I am forced by clear words to do so, to adopt a construction which would leave the trading community at the risk of the assertion of an indeterminate and hitherto unknown right. I come to the conclusion that the plaintiffs' case upon infringement fails, and must be dismissed with costs.

The other part of the case can be dealt with very shortly. It is a fact admitted by the defendants that they have sold under the description "Bismag" a medicinal preparation which is not of the plaintiffs' manufacture. It was established to my satisfaction that such user of the word "Bismag" is calculated to lead the public into the belief that the defendants' goods thus sold are the plaintiffs' goods. There is, therefore, a clear case for relief. I accept the defendants' evidence that they used the word "Bismag" in ignorance of the existence of the plaintiff company and of the possibility of deception. In fact, they themselves called the attention of the plaintiffs to the user of which complaint is made, being under the impression, when they received the writ in this action, that it related to that user, and at once offered to make the necessary amends. They did not, however, by their defence adhere to this line. Accordingly, I must deal with this part of the case strictly. I will accept the defendants' undertaking in the terms of para. 2 of the claim. There will be the usual order for delivery up of labels, and the like, which contain the offending word "Bismag." Upon the footing that the plaintiffs have succeeded in this part of their case, I will order them to pay three-quarters only of the defendants' costs of the action.

Judgment for defendants as regards infringement of trade mark. Judgment for plaintiffs as regards passing off. Plaintiffs to pay three-quarters of defendants' costs.

Solicitors: *McKenna & Co.* (for the plaintiffs); *Edward Davis, Nelson & Co.* (for the defendants).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

WAY *v.* PENRIKYBER NAVIGATION COLLIERY CO., LTD.

[Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), **December 13, 1939.**]

Workmen's Compensation—Course of employment—No evidence of cause of accident—Compensation paid after notice of accident—Whether payments evidence that accident happened in course of employment.

A workman, employed by the respondent company as an ostler, returned home from work on Aug. 22, 1938, injured and with a lump in the groin. He had been found earlier in the day sitting disabled in the colliery, and had been assisted out by the ambulance man there. Up to that date he had been a healthy and regular workman. He was seen by a doctor, who considered that a violent blow would have been necessary to produce the injury. Notice of the accident was given to the employers on the same day. The workman was at home for 11 weeks, during which he was paid 30*s.* a week by the employers. He returned to work, but subsequently collapsed and died on Jan. 23, 1939. There was no evidence as to how, when, or where the accident happened. On a claim for compensation by a dependent, the county court judge found in favour of the applicant on the ground that the injury was suffered by an accident arising out of and in the course of the workman's employment, and that that injury caused or accelerated his death. The employers appealed on the ground that there was no evidence on which the judge could so find :—

HELD : (SLESSER, L.J., dissenting) the payment of compensation by the employers was *prima facie* evidence that the injury was caused by an accident arising out of and in the course of the workman's employment, and, as the employers had done nothing to rebut it, there was evidence to support the finding of the judge.

[**EDITORIAL NOTE.** In this case the most important point raised was whether the payment of compensation by employers to a workman constitutes an admission of liability. Here there was evidence that an accident had happened, but there was no evidence as to how, when or where it had happened. It was held by a majority that the payment without qualification of the full compensation to which the workman was entitled under the Act was *prima facie* evidence of an admission that an accident had occurred for which the employers were liable. Such payment, however, does not amount to an estoppel, as the implication can be rebutted by further evidence as in the case of *Harrison* v. *Featherstone* (2). SLESSER, L.J., however, was of the opinion that the payment did not afford even *prima facie* evidence of an admission of liability.

AS TO ADMISSIONS OF LIABILITY, see DIGEST, Vol. 34, p. 387, Nos. 3135-3140. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 653, 654.]

Cases referred to :

(1) *Pitt* v. *Stretford & District Gas Board* (1936), 29 B.W.C.C. 43 ; Digest Supp.
(2) *Harrison* v. *Featherstone* (1916), 10 B.W.C.C. 54 ; 34 Digest 387, *3138*.
(3) *Manton* v. *Cantwell*, [1920] A.C. 781 ; 34 Digest 257, *2199* ; 89 L.J.P.C. 73 ; 123 L.T. 433 ; 13 B.W.C.C. 55.

APPEAL by the respondents from an award of His Honour JUDGE CLARK WILLIAMS, K.C. at the Aberdare County Court, dated Oct. 26, 1939.

The facts are fully set out in the judgment of SLESSER, L.J.

F. W. Beney for the appellants.

D. P. Maxwell Fyfe, K.C., *Griffith Williams* and *Ralph Etherton* for the respondent.

SLESSER, L.J. : In this case I regret to say that the Court is divided in its opinion. In my opinion, this appeal succeeds. I do not think that there was any evidence on which the judge could find in favour of the applicant that the deceased workman had met with an accident which arose out of and in the course of his employment.

The application for compensation in this case, under headings 3, 4 and 5, nature of employment, date and place of accident, and nature of injury to deceased, states as follows :

> The workman Frederick Way was employed as an ostler at the respondent colliery at Penrikyber and met with an accident arising out of and in the course of his employment therein on Aug. 22, 1938, as the result of which the applicant died on Jan. 23, 1939.

The applicant is a dependant, and no question as to dependency arises. Then, finally, para. 13 is as follows :

> Date of service of statutory notice of accident on respondent from whom com-

pensation is claimed, and whether given before deceased voluntarily left the employment in which he was injured. Notice of injury duly given.

In the answer, it is said, first of all:

> . . . the said Frederick Way deceased did not sustain injuries of the nature and in manner alleged in the request for arbitration on Aug. 22, 1938.

Secondly, it is said: A

> . . . the death of the said Frederick Way deceased was not the result of his alleged accident.

Then, it was said:

> . . . the said Frederick Way deceased died from natural causes.

There is no denial of the fact, and, therefore, it must be taken to be B
admitted that notice of injury had been duly given.

On that, the judge came to the following conclusion, as stated in his signed judgment:

> In this case, I found that the deceased workman on Aug. 22, 1938, suffered an injury in the region of the right groin by accident arising out of and in the course of his employment under the respondents, and that this injury aggravated and C
> accelerated, if it did not cause, the growth and spread of the sarcoma which caused the death of the workman, and that the injury accelerated the death.

The evidence with regard to the alleged accident was as follows. Selina Way, mother of the claimant, who had lived with the deceased for many years, stated that up to Aug. 22 the deceased was a healthy D
man, and that she did not recollect that he had had any serious illness. On Aug. 22, he came home earlier than usual. His usual time of return was 10 a.m. He was employed as a haulier in the colliery, and is described as an ostler in the application. She said he could hardly walk in, and when she was washing him she noticed a "small little lump on the right E
groin." After 11 weeks, he went back to work, and then failed again. Later on, being again incapacitated, he fell and broke his arm and was taken to hospital. He was examined by Dr. Reid Thomas on Aug. 22, the day on which the deceased came home early, and the doctor noticed that he had a large swelling in the right groin and that the skin in that F
area was discoloured and bruised. The doctor expressed the view, which we may assume that the judge accepted, that a violent blow would be necessary to produce that condition. That fact was disputed by other doctors, but the judge was, of course, fully entitled to accept the evidence of Dr. Reid Thomas to that effect. The judge, therefore, was entitled to G
hold, if he accepted that evidence, that the swelling of the right groin, and, I suppose, the many other incidences of sarcoma which broke out in different parts of the man's body, were either caused or accelerated by a blow which he had received on Aug. 22, because Selina Way said that before that time he had had no serious illness and was a healthy man, H
a regular workman, and did not speak of any blow before that time.

If there be any evidence on which the judge could have found, as a fact, that this man had suffered an accident on Aug. 22 which ultimately caused his death, this court could not have disturbed that finding, but it is said by counsel for the employers that there is no evidence at all, and that the judge, in coming to the conclusion which he did, could only have arrived at it by a mere conjecture or guess, and not by the process of logical inference. I do not think that counsel for the appellants disputes (if he does, I do not agree with him) that there was evidence that a violent blow caused the condition of this man, but that still leaves open the question of how this man got a violent blow on Aug. 22. As to that, there is no evidence whatever. It may have been that this man was alone at the time, and that no one could speak to how he received this violent blow. However that may be, there is a complete absence of evidence from any of his mates working with him of any accident at all. Counsel for the appellants says that to assume that the blow arose out of and in the course of the employment is an entire assumption, and merely to state that the blow caused the ultimate death of the workman is no ground for saying that the death was caused by an accident arising out of and in the course of his employment, because there was no evidence as to how, when or where the blow was received by this man.

I have not repeated the rest of the evidence, because it is entirely negative in character and throws no light upon the cause of the accident. If the matter had stayed there, I should have entertained no doubt at all but that there was no evidence upon which the judge could have come to the conclusion that this blow was caused by something which happened at this man's work. However, there is raised another question, which has caused a good deal of discussion and the citation of authority, with which I must deal. It is said by counsel for the respondent that there is evidence which the judge could follow in coming to his conclusion, other than the evidence that this man's blow caused his death, which the judge may have taken into account, and which appears in the notes of an oral judgment recorded by the solicitor for the appellants, or, at any rate, as being one of the elements which was before his mind, and it is this. Selina Way states in her evidence that, during the period when he was home for 11 weeks, between Aug. 22 and the time when he went back to work, he was on full compensation of 30*s.* per week, and it is said that that statement, coupled with the fact that it is conceded by the appellants that a notice of injury was duly given, amounts to evidence that this man was being paid compensation in respect of an accident which happened on Aug. 22, and, as I understand the way it is argued, that accident can only have been in relation to the blow which caused the little lump on the right groin which kept him at home.

This argument, to my mind, is one which is very deserving of careful consideration. In my view, what is admitted here, on the evidence, and what is to be derived from the evidence, does not amount, on this head, to anything from which the judge was entitled to draw the inference that the dependant's claim should succeed. Compensation under the Workmen's Compensation Act may be paid in at least four different conditions. It may be paid as the result of an award. That, of course, is not this case. Secondly, it may be paid as the result of a recorded agreement. That is not this case. Thirdly, it may be paid as the result of an agreement not recorded, and, fourthly, it may be a mere voluntary payment not made under any agreement at all. This payment may or may not have been made under an agreement. It is sufficient for my purpose to say that I can find no evidence that it was so paid under an agreement, and it may well have been paid, and, possibly, was paid, as a mere voluntary payment. I do not think it would be right to draw the conclusion that, because an employer had received notice of an accident—I believe I am right in saying that it is a statutory obligation in the case of a colliery company to keep an accident book in which accidents are recorded, if not directly reported to the employer or foreman—and a payment of money was made which somebody else (in this case, Selina Way) describes as compensation, that constitutes by itself any evidence of an agreement between the employer and the workman that in consideration of the accident, the workman shall receive the payment. It seems to me quite as likely that, this man giving notice of the accident, this money was paid without prejudice to any rights which the employer might or might not have had at any future time to terminate that payment, subject, of course, to the operation of the Workmen's Compensation Act, 1925, s. 12, which limits the right to stop compensation once it has been paid. That does not apply in this case, because the workman, in fact, had returned to work.

I find myself unable to draw any conclusion that that is any admission on behalf of the employers that they paid compensation in relation to an accident—that is to say, an admission that in this case the accident happened on Aug. 22, which resulted in the workman's death, which might have been caused by the blow, as stated by Dr. Reid Thomas. For all I know, it may be that compensation was paid in relation to some disability on Aug. 22 which was not the result of the blow at all, but of some other cause. I do not think it is right to speculate on these matters, and counsel for the appellants seemed to me to put a very pertinent question to the court when he asked the rhetorical question: "If this be an admission, of what is it an admission?" I think it can, on any view, amount to no more than an admission that on that date, having received a notice of an accident, the employers paid to the workman a certain sum of money, possibly equivalent to the sum which he would have been entitled to receive if he had had a right to compensation.

I do not think myself that the authorities carry the matter any further. It is admitted that in this case no question of estoppel arises. There is nothing to preclude the employers, as a matter of evidence, from raising any point which they desire to raise, and the only question is whether they have made here an admission sufficient to afford some evidence, if evidence otherwise be lacking, that this man by this blow while working in the course of his employment met his death. For myself, I can find nothing to support that view. In *Pitt* v. *Stretford &*

District Gas Board (1), cited to us by counsel for the appellants in reply, it appears that a workman had made a statement to a foreman of an accident, which was duly entered in the book kept as a register of accidents under the Workmen's Compensation Act, 1925, s. 15. That book was for the purpose of satisfying the conditions of compensation, and A it was argued by counsel for the appellant that that entry was evidence of the fact that the man had met with an accident, the question otherwise being whether it was any evidence of an accident arising out of and in the course of his employment. This court came to the conclusion that the mere entry in the book of the accident could not be used as B evidence of the occurrence of the accident. In giving judgment, I say, at pp. 45, 46:

> It is evidence for that purpose [that he had given notice] and, in my opinion' for no other purpose. It is evidence that the man did make a statement to the foreman on July 27, that he had met with an accident.

C

In this case, having given that notice, the employers paid compensation, which, as I say, may have been paid voluntarily or not, but, however it was paid, the fact that it was paid seems a very long way from constituting any admission that this man met with any specific accident on D that date. It is not conclusive, but it is at least to be noted that not only in the application for arbitration, but also in the judgment itself, no accident is defined as to place, time or condition, and, reading the judge's judgment, we are left completely in the dark as to what this blow was which alone can be said to be the effective cause of the E accident. The judge abstained from finding that this man ever did meet with any blow at all, and, apparently, as pleaded, it was no part of his case. At any rate, the workman was unable, in making his claim, to define how, when or where this accident occurred. It would be wrong to draw from the mere fact that the employers did pay compensation F on Aug. 22, which may have been *ex gratia*, the conclusion that that was an admission that this man had suffered a blow while at work. The authorities, although I abstain from citing them, satisfy me that there is no ground on which such an inference can properly be drawn. Therefore, so far as I am concerned, this appeal would succeed. As the G majority of the Court are of a different opinion, however, this appeal fails, and must be dismissed.

MACKINNON, L.J.: This is an appeal from an arbitration in which it was alleged that the applicant's father died as the result of an accident H on Aug. 22, 1938. It was asserted by the applicant that the death was caused or accelerated by the alleged accident, and the county court judge held that that assertion had been established and awarded her compensation. There is an appeal to this court which is only capable of being pursued if the county court judge was wrong in law, his findings of fact being binding upon this court. The only question argued, and the only question before us, is whether there was any evidence on which the county court judge could, as he did, come to the conclusion that the workman met with an accident on Aug. 22.

The evidence with regard to that was that of three persons—namely, Williams, the ambulance man in the colliery, Selina Way, the mother of the applicant, and Dr. Reid Thomas. Selina Way, who lived with the deceased, gave evidence that up to Aug. 22, 1938, presumably when she saw him depart for his work, he was a healthy man and a regular workman. It appears from the evidence of the ambulance man that the deceased went down the pit at about 5.30 p.m. At 6.30 p.m., the ambulance man was called by the master haulier and directed to see the deceased. He found the workman sitting on a bin in the stables, where his work was, suffering from a lump in the groin, which disabled him. The workman had to be helped out and tottered home. Then, to resume the evidence of Selina Way, he came home at about 10 a.m., which was earlier than usual, and could hardly walk. She also saw the lump in his groin. The doctor said that he saw him on that morning, that he found a large swelling in the right groin, and that a violent blow would be necessary to produce that condition. The further facts proved were that the man gave notice of the accident on Aug. 22. That is alleged in the pleading of the applicant, and was not denied in the defence. She further proved that he stayed at home for eleven weeks and received from the respondents full compensation under the Workmen's Compensation Act, at 30*s.* per week.

Those were the facts proved. The question is—and it is a very subtle one, and I agree so far that it is a difficult one, and one on which my opinion has fluctuated during the course of the argument—whether or not, on proof of those facts, if not displaced or disputed by evidence on the part of the respondents, there is evidence on which the county court judge could come to the conclusion that there was an accident. I think that there is some evidence on which he could come to that conclusion, the main point being, in addition to the other facts I have stated, that the deceased made his claim for compensation, and that for 11 weeks compensation was paid to him by the company. *Prima facie*, at any rate, it was paid upon the basis that he had met with an accident, and the giving of compensation under that head, I think, is some evidence. The respondents could have given evidence, had they been able to or had they desired to, that, though 30*s.* per week was paid to him, it was not paid by way of any recognition or admission on the part of the company that he had met with an accident, and that it was paid without any investigation into the facts, or without prejudice, or merely out of charity, or in some other way. In the absence of any evidence from the respondents, however, I think that the fact of their paying compensation under the Act, or the amount of compensation which would be recoverable under the Act, for 11 weeks, left unexplained, is some evidence that they admitted that there was an accident, and that admission, taken with the other facts which I have indicated, is evidence on which the county court judge could come to the conclusion which he did.

It occurs to me that one may test it in this way. Supposing counsel, before this case came into court, had been asked to advise on evidence, and was given a statement that the various facts which I have indicated A could be proved. I think that he would be right in saying: "If you can prove those facts, that will be a *prima facie* case, but, of course, I must warn you that we cannot foresee what evidence the respondents may call. If the respondents call evidence to rebut any of those facts, and, in particular, if they call evidence to explain away the *prima facie* B inference to be drawn from their payment of compensation of 30*s.* per week, we may be in difficulties." As no evidence was called by the respondents, I think that, upon the facts I have stated, there was some evidence on which the county court judge could come to the conclusion he did. In the result, I think that this appeal fails, and must be dismissed.

C

GODDARD, L.J.: I agree with MACKINNON, L.J. The only question in this case is whether or not there was evidence of an accident to the workman arising out of and in the course of his employment. I need not go through the facts which have just been recited by MACKINNON, L.J. D The outstanding feature of the case, to my mind, is this. Notice of an accident stating that an accident had happened on Aug. 22, which is the date upon which the applicant alleges the accident happened, was given by the deceased man to his employers. Thereupon, for 11 weeks—that is to say, until he returned to work—full compensation was paid by the E employers to the workman. By "full compensation," I understand, is meant the full amount which he was entitled to receive under the Act, and, so far as the evidence goes, it was paid to him without qualification of any sort whatever. I find it very difficult to see how it can be said that that is not some evidence on which the judge can find that the respondents F to the arbitration admitted that an accident had taken place.

The cases to which we have been referred were all cases in which it was sought to say that payment of compensation amounted to an estoppel. It does not amount to an estoppel, and no one has suggested that it does, but, although it does not amount to an estoppel, it may G very well amount to *prima facie* evidence of an admission, which can be rebutted if the respondents choose to give evidence to rebut it. Of the cases cited, the one which I think brings out the distinction most clearly is *Harrison* v. *Featherstone* (2). In that case, an employer had paid to a lad compensation for an accident which the employer believed H had taken place. When he ceased to pay compensation and the case came before the county court judge, the whole facts were gone into, and, on the evidence, the county court judge was satisfied that there had never been an accident to this boy at all arising out of and in the course of his employment. He had met with the accident through larking. The county court judge said that, the respondents having paid compensation, they were estopped from denying that an accident had taken place. This court said that that was wrong and that there was no estoppel, but the court did not, in that case, have to consider the question whether or not the payment of compensation amounted to an admission, because the whole facts were gone into, the circumstances in which the payment was made were explained, and the county court judge found as a fact that the accident did not happen in the way alleged by the boy. Therefore, there being no estoppel, the boy was not entitled to any compensation.

The only case in which this matter has been adumbrated at all is *Manton* v. *Cantwell* (3), in the House of Lords. In that case, which came from Ireland, the county court judge in Ireland had held that the respondent was not estopped by an agreement from denying liability, but had found that the appellant was employed for the purpose of his employer's trade or business. The question was whether or not the employment was for the purpose of the employer's trade or business. The Court of Appeal in Ireland reversed the county court judge on that fact, and held that the workman was not employed for the purpose of the employer's trade or business. When the case came before the House of Lords, the actual decision of the House was that the county court judge's decision must stand because it was a question of fact, and he had evidence before him on which he could find as he did that the man was employed for the purpose of the employer's trade or business. However, as the county court judge had given a judgment on the ground of estoppel, LORD BIRKENHEAD, L.C., and VISCOUNT FINLAY dealt with that point, and said, as this court had said in *Harrison* v. *Featherstone* (2), that there was no estoppel, and, since they were restoring the judgment of the county court judge, LORD BIRKENHEAD, L.C., did not find it necessary to deal with this question of the admission, which had not been argued in the court below, and was not necessary to be gone into in the House of Lords, because, quite apart from any question of admission, the county court judge found facts which entitled him to make the award which he did. Therefore, this point, so far as I know, has never yet come before the court.

It seems to me that it is *prima facie* evidence that the employer has admitted that an accident, for which he was liable to pay compensation, arose if he paid the man full compensation, without qualification, for 11 weeks. I quite recognise that considerate employers from time to time have been known to pay compensation for accidents, although they may be under no legal liability to do so. Generally, when that happens, one finds that the money is stated to be paid without prejudice, or as an act of grace. After all, however, we are dealing here, not with what I may call a private employer, but with a colliery company, and, as everybody knows, in these matters of employer's liability under the Workmen's Compensation Act, insurance companies are concerned, and, indeed, rights are given to the workmen, in certain circumstances, to enforce their rights against insurance companies, and it is very unusual to find a workman receiving full compensation for 11 weeks without any qualification that it was paid without prejudice, and so forth, on the footing that it was a mere voluntary payment. If the payment had been made by mistake, or because the employers believed that an accident had taken place, when in fact it had not, or if it was the fact that they accepted the man's word and never took the trouble to inquire into it, they can prove it. Once the widow had proved that her husband had met with an accident and had received the amount he was entitled by statute to be paid by the employer, it seems to me that that is evidence upon which the county court judge could say, so long as that was unexplained and uncontradicted : "I shall hold that that accident entitling the man to compensation did take place on the day from which you paid compensation, which was the day on which the notice admittedly received by you stated that the accident took place."

I think, too, that the case was strengthened by the evidence of the man Williams and by that of the doctor. The man Williams, who was sent to this workman by the master haulier, applied a bandage. Obviously, from the nature of the bandage and from what he saw, Williams thought that an accident had taken place. The doctor stated that from what he saw on this day, from the nature of the swelling, and so forth, he thought that an accident had taken place and that the workman had received a violent blow. Thus, the man received compensation for 11 weeks. He then went back to work again, and ultimately collapsed and died. For these reasons, I think that there was evidence from which the judge could come to the conclusion he did, and, as I agree with MACKINNON, L.J., the appeal must be dismissed.

May I add to my judgment one thing. Counsel for the respondent argued here that the money was deemed to be paid under an agreement within sect. 21 of the Act. I do not want it to be thought that I have overlooked that argument. I only want to say for myself that I prefer to rest my judgment on the ground which I have stated, and I express no opinion as to that argument.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Furniss Wells & Co.*, agents for *Arthur J. Prosser*, Cardiff (for the appellants) ; *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

WATSON *v.* BUCKLEY, OSBORNE, GARRETT & CO., LTD., AND WYROVOYS PRODUCTS, LTD.

[Manchester Michaelmas Assizes (Stable, J.), **November 30, December 1, 1939.**]

Negligence—Dangerous goods—Doctrine of M'Alister (or Donoghue) v. *Stevenson—Applicability to distributors of goods—Exclusion of intermediate examination by advertising safety of user.*

Sale of Goods—Implied warranty—Contract partly sale of goods and partly rendering of services—Dangerous hair dye.

The plaintiff had his hair dyed by the first defendant at her hairdressing establishment with a product which was manufactured by the third defendants and distributed by the second defendants. The product used consisted of the dye proper and a fixative lotion. The latter was intended to contain a 4 per cent. solution of acid, to be diluted to a 2 per cent. solution before it was applied to the head. The distributors advertised the product as absolutely safe and harmless, and as positively needing no preliminary test before use. The hairdresser showed these advertisements to the plaintiff and told him that she had not put the product to any test and had had no experience of it in action. The plaintiff, upon whom no preliminary test was made, decided to try it, and the hairdresser, without negligence, applied it to his head strictly in accordance with the distributors' directions as to diluting the lotion and otherwise. In fact it was found that the lotion used was a 10 per cent. solution instead of a 4 per cent. solution, and as a result the plaintiff contracted dermatitis. The solution had not been examined by the distributors before they passed it on to the first defendant. The distributors had, in the course of their negotiations with the manufacturers, been informed that the solution should not be more than a 4 per cent. solution but took no precautions to make strict conformity with this requirement a term of their contract with the manufacturers, nor did they at any time test the solution supplied. The plaintiff claimed damages against the hairdresser in contract and against the distributors in tort for negligence. The manufacturers, who had gone into liquidation, did not appear and the claim was not prosecuted against them. It was contended, on behalf of the hairdresser, that she had negatived any implied warranty that the product was safe, and on behalf of the distributors, that, even if carelessness were proved against them, they were under no liability to the plaintiff as they were never in direct relationship with him:—

Held: (i) the hairdresser was liable in contract, as, by using the product, she had impliedly warranted that it was a merchantable hair dye.

(ii) the second defendants were liable, as, on the facts, they were found to be negligent, and by their advertisements they had intentionally excluded interference with, or examination of, the article by the consumer and hence had brought themselves into direct relationship with him.

(iii) the product was itself a dangerous one, even if only the proper percentage (4 per cent.) of acid had been present, and hence an unusual standard of care was required, and the distributors, on this further ground, owed a duty to take care towards the plaintiff, and were in breach of that duty.

[**EDITORIAL NOTE.** This is a case of exceptional importance and interest on all the points decided, but undoubtedly the principal interest lies in the extension of the doctrine of *M'Alister* (*or Donoghue*) v. *Stevenson* (2) to distributors of goods, as distinct from manufacturers. It is probable that the application of the doctrine to distributors is limited, and it is necessary to show that in some way they have been careless in their handling of the particular goods.

AS TO THE DOCTRINE IN *M'Alister* (*or Donoghue*) v. *Stevenson*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 361a-364m.]

Cases referred to:

(1) *Myers* (*G. H.*) *& Co.* v. *Brent Cross Service Co.*, [1934] 1 K.B. 46; Digest Supp.; 103 L.J.K.B. 123; 150 L.T. 96.

A (2) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(3) *Parker* v. *Oloxo, Ltd., and Senior*, [1937] 3 All E.R. 524; Digest Supp.

(4) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18.

B ACTION for damages. The claim against the first defendant was founded on contract and was for breach of warranty. The second and third defendants were sued in tort for fraud and negligence. The issue of fraud was abandoned. The case against the third defendants was not pursued. Watson was in the habit of having his hair dyed at Mrs. C Buckley's establishment, and had never had any cause to complain of the skill and care of Mrs. Buckley. On June 20, 1938, he called at Mrs. Buckley's shop by appointment to have his hair dyed an auburn shade. Mrs. Buckley told him that a new dye, "Melereon," had come on to the market, and showed him some advertising matter relating to D the dye in a trade journal. The dye was used on Watson's head, and he contracted dermatitis. The dye was in two parts, a preparation of powder, and a fixative lotion. The lotion in this case was found to contain a 10 per cent. solution of chromic acid.

N. H. Lever for the plaintiff.

E *A. Denis Gerrard* and *E. Perez* for the first defendant.

D. P. Maxwell Fyfe, K.C., *H. Simmons* and *C. T. B. Leigh* for the second defendants.

The third defendants did not appear and were not represented.

Lever: The article was not of merchantable quality: Merchandise F Marks Act, 1887, s. 17.

Gerrard: In the simple case of a client going to a barber, there is an implied warranty that the barber will use due skill and judgment: *Myers* (*G. H.*) *& Co.* v. *Brent Cross Service Co.* (1). I decline to draw an analogy between this case and the Sale of Goods Act, 1893, s. 14.

G STABLE, J.: This is analogous only in so far as Watson relied on Mrs. Buckley's skill and judgment in selecting dyes.

Gerrard: He knew she was no wiser than he was, and, therefore, the implied warranty is rebutted.

STABLE, J.: This article is sold partly by description—"hair dye" H —and partly by trade name. There must be a warranty that it is a hair dye.

Gerrard: The position is rather that Watson has a choice between what Mrs. Buckley has tested and what she has not. If he chooses a dye she has not tested, he takes the risk. Further, this is a purchase by name, and not by substance, on the part of the buyer, and the seller is exonerated. The seller's lack of knowledge here overrides the implied warranty.

Fyfe, K.C.: The two questions to be decided are (i) was there carelessness, on the facts, on the distributor's part? and (ii) was there a duty on Watson to take care? [Counsel referred to SALMOND ON TORTS, 9th Edn., p. 459, and to *M'Alister (or Donoghue)* v. *Stevenson* (2), at p. 599.] The A
manufacturer and consumer must be brought into direct relationship. The distributors are not connected directly here, as (i) they are not manufacturers, and (ii) they have not excluded intermediate persons. Mrs. Buckley represented this as a merchantable article. [Counsel referred to *Parker* v. *Oloxo, Ltd., and Senior* (3) and *Grant* v. *Australian* B
Knitting Mills, Ltd. (4).]

Simmons followed.

Lever in reply.

STABLE, J.: This is a case, from the legal point of view, of some interest. The plaintiff claims damages from Mrs. Buckley and Messrs. C
Osborne, Garrett & Co., Ltd., and from Wyrovoys Products, Ltd., by reason of the fact that on June 20, 1938, he attended Mrs. Buckley's hairdressing establishment and there had his hair dyed with a product which was manufactured by Wyrovoys Products, Ltd., distributed by Ogee, Ltd., and rubbed on his head by Mrs. Buckley, as a result of which, D
as he alleges, he contracted dermatitis. He claims against Mrs. Buckley on contract, and on nothing but contract. His claim against Ogee, Ltd., and Wyrovoys Products, Ltd., was, in the statement of claim, based on negligence and fraud. Before I deal with the case, it is only right, at the very outset, that I should make it quite plain that, so far as E
there was an allegation of fraud, there was not one scintilla of evidence, from start to finish of this case, to support any such allegation, and the allegation was very properly withdrawn without qualification and without reservation by counsel for the plaintiff at the conclusion of the evidence which he had called. F

On June 20, Watson, as I have said, had his hair dyed with this material by Mrs. Buckley for reward. As a result of that, beyond a shadow of a doubt, he contracted dermatitis and has suffered damage. No evidence of negligence on the part of Mrs. Buckley was adduced, and any allegation of lack of care or skill on her part was expressly G
disclaimed on behalf of the plaintiff.

A Spanish gentleman named Wyrovoys, who had carried on his hairdressing trade at Barcelona, being driven out of Spain, came to London. Ultimately he was introduced to one Osborne, the managing director of Ogee, Ltd. Ogee, Ltd., is a limited company which, I am told, has H
carried on business for over a century in the distribution of lotions and various articles of that sort which are found in hairdressers' shops. It is an old-established business, and the present managing director has told me that his own family has been associated with the business since its inception. It is sufficient to say that it is an old-established,

important and highly reputable concern, to which Wyrovoys represented that he had got a hair dye, a secret process which dyed hair successfully and which was safe. He told Osborne that he had used it in Barcelona for 16 years and had never had a complaint as to its harming anyone, and Osborne was interested in the matter.

A Ultimately, an agreement was made on Jan. 9, 1938, between trustees for Wyrovoys Products, Ltd., a limited company which on Jan. 9, 1938, had not then come into existence, and Ogee, Ltd. At some time prior to the hearing of the case, the former company went into liquidation. The written agreement provided, in not unfamiliar form, for the appointment B of Ogee, Ltd., as the sole selling agents and distributors for a certain geographical territory. The appointment was for 3 years, and the agreement provided the price at which the commodities were to be supplied to the distributors, and contained a clause which left the packing and get-up for sale in the discretion of Ogee, Ltd., subject to C the approval of Wyrovoys Products, Ltd. Cl. 9 provided that Ogee, Ltd., the distributors, should advertise and push the sale, and cl. 11 provided a guarantee by the proprietors—namely, the trustees for the company—that the product was, to the best of their belief, harmless. Before that agreement was signed, Dr. Parry, a well-known analyst, D had had a specimen of this dye. I should say that the dye is sold in two bottles, one the dye proper, and the other the fixative lotion. Dr. Parry had certified that he had examined the sample, and that he found it to be a very efficacious hair dye of a harmless character which might be used without any ill-effects. What Dr. Parry examined, E however, was the hair dye and the fixative lotion at its 4 per cent. solution of a certain acid, and he made the examination on the basis that the 4 per cent. solution of this acid was to be diluted to 2 per cent. before the lotion was applied to the human head.

In performance of this agreement, Wyrovoys Products, Ltd., appear F to have set up a factory. So far as we know, it was somewhere in Great Portland Street, but no one who gave evidence before me saw the factory, or seems to have known who was in charge of the manufacture, or who was supervising. From time to time, however, deliveries were made, the lotion in carboys and the powder in cartons, and the practice G was that, when these deliveries to Ogee, Ltd., were made by the manufacturer, the liquid was poured from the carboy into the attractive bottles in which it was distributed to the trade, and the powder or a solution of it was supplied in some other container. This was done by Ogee, Ltd., and it was done, admittedly, without any sort of test H being made as to whether the lotion contained a safe proportion of this acid, which, for the purpose of this judgment, I will call chromic acid. I do not suppose that that is technically the right word, from the chemist's point of view, but it has been called so many things, from potassium chromate to chromic acid, that, as I must fix on some name, I will call it chromic acid.

I ought to say that actually the sample which was submitted to Dr. Parry for analysis contained 4 per cent. of this chromic acid, and. on dilution, before being put on to the customer's head, if the directions were complied with, it would be reduced to 2 per cent. I was told in evidence that the most important and essential stipulation—namely, that the chromic acid was not to exceed 4 per cent. in the lotion—was A merely mentioned as between Ogee, Ltd., and the manufacturers at a general conversation, but the percentage of chromic acid was never the subject-matter of a particular clause in the written agreement, nor was this particular percentage ever reduced to writing or brought to the mind of the manufacturers other than by word of mouth, and one cannot B help thinking that, in dealing with a limited company such as Wyrovoys Products, Ltd., were—after all, human beings come and go—it was a very grave omission that written confirmation of, and insistence on, the importance of this 4 per cent. limit was non-existent.

Having taken over delivery of this in the way they did, and having C put it up in the cartons and bottles for distribution to the trade, Ogee, Ltd., proceeded to advertise the commodity somewhat extensively. An advertisement appeared in the HAIRDRESSERS' WEEKLY JOURNAL, a work which, although perhaps of rather more interest to the particular trade than to the general public, is registered as a newspaper. The D issue of June 4, 1938, contained, among other references to this product, a full-page advertisement on pp. 2376, 2377. I will not read it all, but on the lefthand page, it is important to observe, we see this:

> Mark your next hair dye order "Melereon" the safe harmless hair dye.

E

Then on the righthand page we are told that this preparation:

> . . . has no ifs or buts; is a hair dye that will not harm the most sensitive skin, the hair dye that positively needs no preliminary tests.

That advertisement appeared in a newspaper controlled by Ogee, Ltd. It was an advertisement which they themselves approved F and prepared, and for which they were responsible in every sense of the word, and it was thus that this preparation was launched on the world.

In 1938, Watson, like most of us, found he was not getting any younger. He is a waiter by occupation, and he found that, the older you get and the older you look, the harder it is to get a job, so, very G sensibly, when patches of grey appeared in his hair, he adopted the practice of going to Mrs. Buckley, who carries on an old-established hairdressing business, and having this slight infirmity removed. On June 20, 1938, he went to Mrs. Buckley for that purpose. Mrs. Buckley had got in a supply of this new hair dye. She had the advertisement H in the HAIRDRESSERS' WEEKLY JOURNAL, and she had one or two little brochures. These are both in evidence, and contain a certain amount of directions as to the use of this hair dye. They lay considerable emphasis on the fact that "It is the harmless hair dye" and that "It combines the qualities of colour and safety." It is said in the brochure:

> It has been claimed before, but this time [in large print] it is true. It is new.

> It is different from any hair dye previously put on the market. It contains no poison, toxic, or harmful ingredient. [Then, in large print] Since "Melereon" is harmless, no previous test is required.

It was suggested by the plaintiff that, when Mrs. Buckley dyed his hair, she expressly warranted to him that the hair dye was harmless. The evidence does not support that at all. Watson came in to have his hair done, and, instead of using the other dye which she had used before, Mrs. Buckley told him that she had a new hair dye in the shop. She showed Watson the advertisement in the HAIRDRESSERS' WEEKLY JOURNAL, and the brochure, and Watson read them and was impressed. Mrs. Buckley told Watson that she had not put this hair dye to any test, and that she had had no experience of it in action. There it was, with the advertisement and the registered name "Melereon," and that is all she knew about it. Watson decided that he would give it a trial, and accordingly Mrs. Buckley set to work. I am quite satisfied that Mrs. Buckley carried out the directions for the application of this dye carefully and scrupulously, in accordance with the pamphlet which she received from the distributors, and, as I have said, no suggestion of negligence or lack of skill was made against her. Watson left, and immediately afterwards developed a sharp attack of dermatitis. He was confined to hospital for some time, and suffered very considerable pain and discomfort. He has made an excellent recovery, and I do not think that the ill-effects of this mishap are permanent in any shape or form. There can be no doubt that the cause of the dermatitis was the application of the dye, or, rather, not so much the actual dye as the lotion which was applied afterwards, and which formed part of the product which Ogee, Ltd., distributed.

It has been argued that, on that, Mrs. Buckley is not liable to Watson in contract. It is quite plain that this was not a sale of goods, pure and simple. It was a contract for reward—I ought to have said, of course, that Mrs. Buckley was paid for what she did in the ordinary way—whereby Mrs. Buckley undertook to dye Watson's hair, and I do not think Watson relied on any representation which Mrs. Buckley made in relation to this hair product, because she did not make any, beyond the fact that there it was, and there was the advertisement, which Watson read. No doubt, I think, Watson, probably unconsciously, or subconsciously, felt confident that anything he found at Mrs. Buckley's establishment would come from a reliable origin, as, indeed, this particular commodity did.

It has been argued on behalf of Mrs. Buckley that any implied warranty there might be must, on the evidence in this case, be negatived by the fact that she told Watson, as she did, that she had not tried this stuff herself and that it was new to her. In my view, although I think the point one of very considerable interest, I do not think that that represents the law. I have been referred to *G. H. Myers & Co.* v. *Brent Cross Service Co.* (1), which, in my judgment, establishes that in such transactions as this, which is really half the rendering of service and, in a sense, half the supply of goods, the implied warranty is no less than it would be in the case of the sale of goods simply.

Perhaps before I dispose of the claim against Mrs. Buckley I ought to continue the narrative of facts. The plaintiff, owing to obvious difficulties, was not in a position to prove the analysis of the particular bottle that was used on Watson's head, but counsel for the distributors admitted that, actually, the percentage of chromic acid in the bottle was 10 per cent. In my judgment, on the evidence, there is no doubt whatever that, although some heads, or scalps, are tougher than others, a 10 per cent. solution (and, to save constant repetition, when I say 10 per cent. or 4 per cent., whichever it may be, by the time it reaches the head must be divided by two) is dangerous, and a hair dye that contains a lotion with a 10 per cent. solution of chromic acid is not a hair dye which is merchantable as a hair dye.

I do not think that Watson relied upon Mrs. Buckley's knowledge of the preparation. I am quite satisfied that he did not, but, none the less, although Mrs. Buckley said, "All I know about this thing is what the advertisement says, and I have not used it," in my view there is an implied warranty, or it is an implied term of the contract, that, when I go into a hairdresser's shop and say I want my hair done, the hairdresser will apply to my head something which is a hair dye, and not something which, in this particular case, through no conceivable fault or negligence on the part of Mrs. Buckley, was in fact a poisonous and harmful substance. I think that this particular bottle had got out of the category of what one might call an imperfect hair dye and was not really fit to be used as a hair dye at all. The acid was much too strong, and I think that Mrs. Buckley, in treating Watson's head, under the relationship which was contractual, notwithstanding the fact that she told him what I have already stated, impliedly warranted that what she was rubbing into his head was merchantable hair dye. I do not think she represented, or warranted, or can be taken to have warranted, that it would dye his hair well, or ill, or this colour or that colour. I do not think the implied warranty went any further than that she contracted to rub into his hair something which was fit for hair dye. In fact, it was not. In those circumstances, I think that Watson is entitled to judgment against Mrs. Buckley on that basis alone.

The second question, and it is very interesting, is the question of judgment against the distributors. I need not discuss, and do not intend to discuss, the position as between the plaintiff and Wyrovoys Products, Ltd. That company has not appeared. It has gone into liquidation, and apparently it is a matter of no importance whether or not judgment is recovered against it.

In order to succeed against Ogee, Ltd., the plaintiff has to prove three things. He has to prove—I am not speaking perhaps in strictly technical legal language—(i) carelessness in fact, (ii) duty owed to him, in the particular circumstances of this particular case, by Ogee, Ltd., and (iii) breach of that duty, if it exists, and the consequences of that.

First of all, was there negligence in fact ? In my judgment, there was, beyond any shadow of doubt. When I say negligence, I do not mean actionable negligence. I mean carelessness. I need not detail the facts at length. One has to take everything into consideration. Ogee, Ltd., were not dealing with an old-established manufacturer who had been supplying them for years. They were, in essence, dealing with a gentleman who had emerged quite unexpectedly from Spain. Although at an interview they stipulated 4 per cent. of the chromic acid—a matter of vital importance in connection with the hair dye, as I have said—that stipulation was never reduced to writing. It was never made a term of the agreement between them and the manufacturers. The percentage was never confirmed in a letter. They never saw where it was manufactured. They took no steps to ascertain under what sort of supervision the manufacture was carried on. When deliveries were made, no test of any sort, kind or description was made. I am not suggesting that they ought to have tested every consignment. Perhaps it would have been enough, I do not know, if they had made a sample test here and there. I was told that the test could have been made, and that it took 30 seconds. In fact, however, there was no test at all of the deliveries. Last, but by no means least, this commodity, of which they knew singularly little, and in connection with which they had taken no steps whatever to ensure that the deliveries of the commodity were in accordance with the stipulated article, was put out to the trade and to the world as being the hair dye which, in contradistinction to every other hair dye, was absolutely safe and harmless, could not harm the most sensitive skin, and positively needed no preliminary tests. I need not labour the matter. That, in my judgment, was carelessness. Before committing their name to such an assertion to all and sundry, they should have taken far greater care to ensure that that assertion was based on solid ground. In fact, nothing, or virtually nothing, was done to see that what was being distributed by them was this absolutely safe commodity. As the result of that carelessness, Watson has been severly injured. He read the advertisement. He told me that he was interested by the advertisement, and that it was because of the advertisement that he had the dye used, believing what he was told, and he suffered accordingly.

The very interesting question which arises is whether or not there was a duty, and I have been referred to *M'Alister* (*or Donoghue*) v. *Stevenson* (2). It was pointed out that there are certain passages in the opinions in the House of Lords which tell very strongly in favour of this defendant. The material passages are in the opinion of LORD THANKERTON, at p. 603, and in the opinion of LORD ATKIN, at p. 599. LORD THANKERTON says, at pp. 602, 603:

> The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be

> dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that neither the law of Scotland nor the law of England will hold that the manufacturer has any duty towards the consumer to exercise diligence.

I will not read the rest of the passage, nor will I read the opinion of Lord Atkin, more particularly the passage at p. 599.

A It seems to me that one reason why carelessness plus injury is insufficient and the law demands a duty as well is that, where a manufacturer manufactures an article, and, it may be, months or years afterwards, that article, by reason of the careless manufacture, does harm to the consumer, it is extraordinarily difficult to put one's finger on the tortious act of which the plaintiff in such an action would complain. B The selling of the article is not the act of the manufacturer or the agent. The article itself has ceased to be the property of the manufacturer, or under his control, and, because of that, that may well be the foundation of the undoubted principle that, where the manufacturer has parted with his property and put it in circulation all over the world, C unless the consumer who is ultimately harmed by something which the manufacturer has negligently done can establish the special relationship with the manufacturer, then, under the law of this country, no action for tort will lie.

D How can that special relationship be established? Lord Thankerton tells us at p. 603, Lord Atkin explains at p. 599. Lord Macmillan concurred with Lord Thanketron. I need not read all the passages. but Lord Thankerton says, at p. 603:

> E The special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus—namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer.

F In a few words: "The manufacturer has, of his own accord, brought himself into direct relationship with the consumer."

If Ogee, Ltd., had been the manufacturers, I should have held without difficulty here that, by this advertisement which Watson saw (it is G unnecessary to consider what would have been the case if he had not seen it, or if the contents had not been imparted by someone who had, for, in this case, he saw the advertisement), and upon which he relied, Ogee, Ltd., if they had been the manufacturers, of their own accord would have brought themselves into direct relationship with the consumer. H It is said that here, although the manufacturers would owe such a duty, the distributors, being distributors and not manufacturers, are absolved. It seems to me that that statement must be qualified. The number of cases in which a distributor would owe a duty must, I think, be comparatively few. As it has been said, duty is not duty in the abstract. One does not have to search for the duty *in vacuo*, but one has to look at the facts and decide whether or not the law attaches a duty out of those facts, or to those facts.

The initial tortious act or careless act—carelessness would be better—was the putting of the 10 per cent. solution into the lotion, and for that the distributors were not responsible. The manufacturers were not their agents. They had no direct control over the manufacturers, and I have to ask myself whether, in law, as between this consumer and this distributor, having regard to all the circumstances of the case, there is a duty. It is extremely difficult to arrive at a legal decision without some guidance as to the sort of test one applies as to whether or not there is a duty. I think I am thrown back on the words of LORD THANKERTON in *M'Alister* (*or Donoghue*) v. *Stevenson* (2). I do not think that it matters whether the man is a manufacturer or whether he is a distributor. It seems to me to be the same in the case of a person through whose hands there has passed a commodity which ultimately reaches a consumer to his detriment. Where that person has intentionally so excluded interference with, or examination of, the article by the consumer, then he has, of his own accord, brought himself into direct relationship with that consumer so as to be responsible to the consumer for any injury the consumer may sustain as a result of the distributor's negligence. The duty is there.

The question is now whether or not it was the negligence of the distributor which did the damage. I think that it was. I do not think that the distributor can escape liability for gross carelessness, where the consumer has been injured, by saying: "The initial mistake was made by someone for whose actions I am not responsible." I think that, if there had been any doubt as to the duty (the two questions are really interdependent, but assume the duty was there) the plaintiff here could have sued both defendants. The negligent act of the manufacturer was putting in the acid in too strong a solution. The negligent acts of the distributor were the various acts and omissions and representations which intervened between the manufacture of the article and its reaching Watson.

If this view is wrong, however, I think that there is another ground on which the distributor is liable. I think that this hair dye was an article which was dangerous in itself. Unquestionably, a 10 per cent. solution is dangerous in itself, but I do not think that that is the proper test. I think that the proper test which I have to apply is whether or not the 4 per cent. solution which Ogee, Ltd., the distributors, thought was contained in the bottle, although they were wrong, was dangerous in itself. On the evidence, it seems to me to be perfectly plain that, although a 4 per cent. solution will not harm most people, it will harm quite a few, and, therefore, it would be dangerous indiscriminately to use a hair dye containing that strength of acid without carrying out certain tests to see whether the particular person on whom the dye was to be used would be affected by it. I think that it is impossible for the defendants here to say that hair dyes are not dangerous. The whole point of their brochures and pamphlets is that hair dyes are dangerous, and what they say is that this hair dye, unique among all other hair dyes on the market, is perfectly safe.

It seems to me that, when they know that the thing they are putting on the market is of a class which is dangerous, although they claim that theirs is the exception to the rule, and know, particularly here, that the hair dye, the solution, the percentage which they think they are putting on the market, is dangerous in fact to quite a percentage of people by whom it will be used, then I think they fall under that principle which demands an unusual standard of care in putting abroad a dangerous article, and which does create a duty between any person by whom the dangerous article is distributed and the consumer who is ultimately injured by reason of some carelessness for which the distributor or manufacturer is responsible.

I think that this article was additionally dangerous. I refer to the observations of SCRUTTON, L.J., about the wolf being a dangerous beast, and the wolf in sheep's clothing even more dangerous, and it is really difficult to think of a better example of a wolf in sheep's clothing than a hair dye being put out to the world containing, as this did, 10 per cent. of the acid, but believed to contain 4 per cent. of the acid, coupled with an advertisement that it was, at last, the perfect, completely harmless hair dye—for which, apparently, the world has been waiting for centuries—so much so that it could not harm the most sensitive skin, and, for that reason, because it was absolutely safe (and the brochure says that in the plainest terms), no preliminary tests of any description were required. It seems to me that there is the perfect example of the wolf in sheep's clothing, and I am not sure that a more apt parallel would not be to describe this as a sheep which the distributors had made as dangerous as a wolf, and, if that is so, then this thing was doubly dangerous. It was dangerous because it was dangerous in fact, and it was more dangerous still because everybody was assured that it was perfectly safe.

On both grounds I am satisfied that counsel for the plaintiff has made good the cause of action against the distributors, both on the principle extended to the facts of this case, or applied to this case, as laid down in *M'Alister* (*or Donoghue*) v. *Stevenson* (2), and also on the principle that this was, on the facts of the case, a dangerous thing to put into circulation by the distributors.

Judgment for the plaintiff for £75 14*s. with costs against the first two defendants.*

Solicitors: *Leslie M. Lever & Co.* (for the plaintiff); *G. C. Kirk* (for the first defendant); *Leader, Plunkett & Leader* (for the second defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

OSCAR HARRIS, SON & CO. *v.* VALLARMAN & CO.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **January 12, 1940.**]

Bills of Exchange—Consideration—Failure of consideration—Partial failure—Remote party—Right of set-off.

The plaintiffs as agents of an American company sued the defendants as acceptors of 8 foreign bills of exchange. The bills were accepted in respect of the purchase of certain machines from the principals of the plaintiffs, and the defendants, in the defence, alleging that the machines did not correspond with the description and were not of merchantable quality, claimed to set off the loss and damage which they had sustained for that reason. It was contended that the paragraphs of the defence in which a set-off was claimed ought to be struck out as showing no cause of action:—

HELD: upon the authorities relating to set-off against a claim upon a bill of exchange, it was not possible to say that the defence did not disclose any reasonable cause of action.

[**EDITORIAL NOTE.** It has been said that loss or damage in respect of a partial failure of consideration can be set off only against an immediate party to a bill of exchange, and that it is not a defence against a holder for value. The Court of Appeal have here held that this proposition is not sufficiently settled that a pleading based on the contrary view can be struck out as showing no cause of action.

AS TO FAILURE OF CONSIDERATION AND BILLS OF EXCHANGE, see HALSBURY, Hailsham Edn., Vol. 2, p. 648, para. 891; and FOR CASES, see DIGEST, Vol. 6, pp. 159-166, Nos. 1025-1052.]

Cases referred to:

(1) *Warwick* v. *Nairn* (1855), 10 Exch. 762; 39 Digest 474, *971*.

(2) *Bow, McLachlan & Co.* v. *Ship Camosun*, [1909] A.C. 597; 40 Digest 380, *116*; 79 L.J.P.C. 17; 101 L.T. 167.

(3) *Bankes* v. *Jarvis*, [1903] 1 K.B. 549; 40 Digest 420, *416*; 72 L.J.K.B. 267; 88 L.T. 20.

(4) *Morgan* v. *Richardson* (1806), cited 7 East, 482, n.; 6 Digest 163, *1044*.

INTERLOCUTORY APPEAL by the defendants from an order of HALLETT, J., dated Dec. 20, 1939, reversing an order made by Master VALENTINE BALL on Nov. 2, 1939. The plaintiffs claimed from the defendants £1,000 4*s.* 5*d.*, as acceptors of 8 foreign bills of exchange drawn in New York upon the defendants, payable in London to the plaintiffs and delivered for collection to the plaintiffs by the drawers. In their defence, the defendants said that they signed the bills, but that they were not holders in due course, and that there was no consideration for the bills. They held them, they said, subject to all equities between themselves and the drawers, inasmuch as the plaintiffs were merely agents of the drawers. Alternatively they said that the bills were accepted in payment for certain machines supplied by an American firm called Simplex, and that they had bought these machines by the description of others previously delivered, but that the machines were defective in breach of a condition of sale, so that the consideration had wholly failed. Alternatively they claimed to set off so much of their loss and damage as would extinguish the plaintiffs' claim. Simplex knew that the defendants required the machines for resale, and the defendants' customers had repudiated their contracts on account of the defects, or had required the defendants to remedy the defects. Particulars of loss and damage were pleaded. The plaintiffs then applied to the master for an order that the paragraphs relating to this transaction with Simplex be struck out as disclosing no defence, tending to prejudice, embarrass or delay the trial, and being contrary to the rules of pleading. The master would not make the order, and the plaintiffs appealed to the judge, who ordered that the paragraphs be struck out. The defendants appealed.

Harold Simmons for the appellants.

Douglas Lowe (for *Harold J Brown*, on war service) for the respondents.

Simmons : The drawer of a bill of exchange accepted for the price of goods sold cannot, by giving the bill to a holder for collection, prevent the acceptor from setting up a right in respect of the goods against the drawer under the Sale of Goods Act, 1893, s. 53. If the drawers had been the plaintiffs, the defendants could have set up their breach of condition in mitigation or extinction of the price. The defendants have that right of set-off against the payees. A mere holder for collection is in no better position than the drawer if he takes subject to the equities of the drawer's rights : CHALMERS ON BILLS OF EXCHANGE, 10th Edn., p. 118. In *Bankes* v. *Jarvis* (3), the court held that an unliquidated claim for damages may be set off against a liquidated claim. *Warwick* v. *Nairn* (1) may be distinguished, as no set-off was claimed in that case.

Lowe : A claim for damages for breach of warranty must be the subject of a separate action against the suppliers of the goods : *Morgan* v. *Richardson* (4) and *Warwick* v. *Nairn* (1). *Bankes* v. *Jarvis* (3) was a decision of a Divisional Court, and does not bind this court.

SLESSER, L.J. : This appeal succeeds. The claim by the plaintiffs, Oscar Harris, Son & Co. (a firm), against the defendants, Vallarman & Co. (a firm), as acceptors of 8 foreign bills of exchange is made on a specially indorsed writ. In an affidavit sworn by Mrs. Cohen, it was stated that the plaintiffs were suing as agents for the Simplex Cloth Cutting Co. of New York. It is clear from the affidavit that the plaintiffs were suing merely as agents. The affidavit recites that the Simplex Cloth Cutting Co., the principals, entered into negotiations for the purchase of certain cloth-cutting machines. In the affidavit, after paragraphs which deal with questions as to whether or not the bills are foreign bills and the like, and state that there was no consideration, there follow numerous paragraphs saying that the bills were accepted in payment of the price of certain leather-cutting, cloth-cutting, and silk-cutting machines, and that the machines were bought as by way of description of the machines previously delivered, and did not correspond with the description, and generally were defective, not reasonably fit, not of a merchantable character, and the like. If the plaintiffs are entitled to recover against the defendants, the defendants say that they will set off so much of the loss and damage sustained owing to the circumstances connected with the machines as will be necessary to extinguish the plaintiffs' claim. All the paras. 4-9, dealing substantially with this claim to a set-off, have been struck out by the A judge as showing no reasonable cause of action, or, in the familiar words of the rule, tending to prejudice the trial of the action.

In my judgment, however, it would be improper at this stage to preclude the defendants, by striking out these paragraphs, from continuing to claim their right to a set-off in respect of the loss and damage B suffered, as they allege, by the defects of the machinery to the extent of so much as can be shown to be the proper subject of a claim for loss and damage. It is quite true that the earlier cases seem to support the view that in such a case, under the old pleading, before the Supreme Court of Judicature (Consolidation) Act, 1925, it would be necessary to C have a cross-action. I refer to such cases as *Warwick* v. *Nairn* (1). The matter is last mentioned in the Privy Council in *Bow, McLachlan & Co.* v. *Ship Camosun* (2), where the position is thus stated, at pp. 611, 612 :

> It seems clear that the change was made, not upon any principle of law, but D upon grounds of convenience, in order to prevent circuity of action. Before the statutes of set-off, it was necessary to bring cross-actions in respect of debts on the one side and on the other, and, except in the cases referred to by PARKE, B., no change was, as a matter of strict law, made with regard to unliquidated damages until the Judicature Acts. No instances were cited to their Lordships of any cases in which this procedure had been adopted, except such as are referred to by PARKE, B., and, indeed, in the cases where a seller or supplier had taken a bill of E exchange for the price, the buyer has been left to his cross-action, unless there has been a total failure of consideration: *Warwick* v. *Nairn* (1).

The rule is thus stated in CHALMERS ON BILLS OF EXCHANGE, 10th Edn., p. 118 :

> Rule 4. Partial failure of consideration is a defence *pro tanto* against the F immediate party when the failure is an ascertained and liquidated amount, but not otherwise. It is not a defence against a remote party who is a holder for value.

Here, as I have said, on the evidence as it now stands, it appears that the plaintiffs are mere agents for this American firm which supplied the machine.

G For myself, I would express no concluded opinion upon what may be decided as to the ultimate rights of the appellants in this case, and I assume for this purpose that the allegations in the defence are true as to the quality of this machine.

However that may be, I think that, in the present state of the law, H since the Supreme Court of Judicature (Consolidation) Act, 1925, it is at any rate very arguable that the defendants may claim as a reduction of the liability under the bills the loss and damage by way of set-off, as mentioned in the defence. I would prefer, as I say, to express no concluded opinion, because the matter is one which may require considerable argument, and I do not wish to prejudge the result of that part of the trial. I find it quite impossible, however, to say that such a statement does not disclose any reasonable cause of action, and I think that the judge was wrong in preventing the defendants from making this claim of set-off. In my opinion, therefore, this appeal should be allowed.

MACKINNON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal allowed with costs in the Court of Appeal and before the judge in Chambers.

Solicitors: *Janus Cohen & Co.* (for the appellants): *Keen, Rogers & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

METROPOLITAN PROPERTIES CO., LTD. *v.* PURDY.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **January 16, 1940.**]

Emergency Legislation—Leave to distrain—Debtor able to pay in full all creditors other than landlord and rating authority—Discretion of court—Order for part-payment of arrears of rent—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1.

The appellant was the tenant of hotel premises and was in arrears with his rent to the amount of £1,819 18*s.* 9*d.* The landlords applied for leave to levy distress. Such leave was given, but suspended on condition that the appellant paid £200 at once and £100 per month off the arrears. The appellant had made a composition with the local authority as to the rates payable in respect of the premises, and, apart from the question of the rent and rates, it was admitted that he was able to pay his creditors in full:—

HELD: under the Courts (Emergency Powers) Act, 1939, s. 1, the court had an absolute discretion as to the order it would make in such a case, and it could not be said that the order in question proceeded upon any wrong principle which would permit its being set aside on appeal.

[**EDITORIAL NOTE.** Where the court has an absolute discretion, that discretion must be exercised judicially, and the Court of Appeal must intervene where any wrong principle has been applied. The order of the judge here appealed from would, however, seem to have been based in principle on the decision in *A* v. *B*, [1939] 4 All E.R. 169; Digest Supp., where it was said that the court was not exercising a bankruptcy jurisdiction, but, at the same time, the existence of debts other than the debt which is the subject of the application is to be taken into account, in considering all the circumstances of the case. In a way, the present case is the reverse of that proposition, namely, that the debtor should not be allowed to pay certain creditors in full while others are deprived of their normal remedies for recovering their debts.

AS TO LEAVE TO ISSUE DISTRESS, see HALSBURY, Hailsham Edn., Vol. 10, p. 477, para. 611; and FOR CASES, see DIGEST, Vol. 18, pp. 274, 275, Nos. 128, 129.]

Cases referred to:

(1) *Stirling* v. *Norton* (1915), 31 T.L.R. 293; 21 Digest 428, *95*.

(2) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

APPEAL by the tenant from an order of TUCKER, J., dated Dec. 1, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

G. D. Roberts, K.C., and *J. D. Farmiloe* for the appellant.

P. E. Sandlands, K.C., and *A. E. Beecroft* for the respondents.

SLESSER, L.J.: This is an appeal arising out of an order of TUCKER, J., made under the Courts (Emergency Powers) Act, 1939, on an originating summons which was issued on behalf of the applicants, Metropolitan Properties Co., Ltd., for an order for leave to distrain for a sum of £1,937 10*s*. against the respondent, Walter James Purdy, who is a proprietor of hotels, being for arrears of rent, due on Sept. 29, of premises on the north side of Harrington Road, South Kensington, in the County of London, known as the Norfolk Hotel. Under the Courts (Emergency Powers) Act, 1939, the remedy to which the summons relates may not be exercised without the leave of the court, and the court has power, under sect. 1 (4) of the Act, to give leave to the applicants to enforce their claim for rent by the levying of distress, and in other ways, subject to such restrictions and conditions as the court thinks proper.

On the matter coming before MASTER MOSELEY, he refused an order that the applicants be at liberty to proceed by levying distress under the Act, as asked in their originating summons. Application was made to TUCKER, J., who varied that order by saying that the applicants should be at liberty to distrain as asked for in their originating summons, but that such leave should be suspended provided that the respondent paid to the applicants:

> . . . the sum of £200 of the sum of £1,819 18*s*. 9*d*. now due for rent before Dec. 31, and thereafter so long as the respondent pays off the balance at the rate of £100 per month.

It is from that condition which was inserted into the order by the judge, who otherwise allowed the applicants to be at liberty to distrain, that appeal is brought to this court. There is no cross-appeal.

The facts of the case, so far as they are material, as displayed in the affidavits on behalf of the appellant in particular, are these. The appellant, Purdy, has been at all material times the proprietor of a large number of hotels, and undoubtedly in past times he has been very successful in those hotels. He is also the proprietor of a house and land in the country, and he has now let that house in the country to a government department, we are told, since Nov., 1939, for a rental of some £400 per annum. The particular hotel, the Norfolk Hotel, Harrington Road, South Kensington, is one of which the applicants here are the landlords. What is said by Purdy—and it is borne out by the return of his expenses and by the reports which have been exhibited to his affidavits—is that substantially he has now sufficient receipts coming in from his hotels to enable him to carry on those hotels if he can be released from his obligation to pay the rent of the Norfolk Hotel and the rates. I do not think that it is necessary for the purposes of this case to go into the figures, which are really not disputed. That is the result of the matter. If the landlord receives no rent, there is no reason to suppose that Purdy would not be able to carry on his hotels, from time to time paying the other creditors, be they tradesmen or other persons, who would have claims upon him arising out of the running of his hotels, except the local authority for rates, in which case a composition or arrangement has been made. In other words, this particular creditor is to carry this business upon his own shoulders, the other creditors receiving all their moneys from time to time in full. No doubt it was some such consideration as that which urged the judge to vary the order of the master, and to see, so far as possible in the difficult times in which we live, that under the statute both the debtor and the creditor should receive consideration, but should also be protected from unnecessary hardship. In the result, the judge made the order which I have mentioned, which provides, not that Purdy should pay the whole of his rent now for which he is at present liable, but that he should pay only £200, and thereafter discharge his liability to the extent mentioned in the order at £100 per month, and that, if he does that, he should be free from the common law remedy of distress.

As was said in *Stirling* v. *Norton* (1), dealing with the very similar language of the Courts (Emergency Powers) Act, 1914, the question of whether leave shall be given to distrain, and, if it be given, whether it be suspended, and on what conditions, is essentially a question "for the absolute discretion of the learned judge." It is quite true that in *Evans* v. *Bartlam* (2) the House of Lords indicated that, if this court were of opinion that the exercise of discretion by a judge given him by statute would result in injustice, this court had power to exercise its own discretion, notwithstanding the fact that the judge had not committed any error in law. In my view, however, it is impossible to say in this case that the exercise of discretion would result in injustice in the sense that Purdy could say that he had suffered an injustice by this order. I think that it is a reasonable attempt to protect both parties. The landlords in their turn are liable for the ground rent. It would be perhaps invidious that this hotel should be continued, with the result that possibly the landlords themselves would be in the position of being unable to discharge their liabilities to their head landlord because Purdy was unable to discharge his. It is an unfortunate situation, but the result, I think, is one with which this court cannot properly interfere.

As to the argument which has been put forward that it would not be to the advantage of the landlords to exercise their powers if Purdy failed to comply with the conditions, that seems to me entirely outside the sphere of this appeal. It may well be that the landlords, if they do exercise their rights of distraint here, will have killed the goose which lays, I will not say the golden, but the somewhat addled eggs which are likely to be laid. At this period, in any event, that is not the question before us. It may be (and I hope it will be) the case, if I may say so, that in the interests of both parties the landlords will from time to time watch the prosperity of Purdy's business, and, if the matter turns out worse than they expect, they may find it in their interest not to distrain, albeit Purdy cannot produce in any particular month the whole sum. It seems to me essentially a case in which the parties would be well advised to get together from time to time and see what can be done. It is to Purdy's interest to discharge his liabilities as far as he can, and it is to the landlords' interest, I should have thought, to see that the business continues as long as it can. So far as this appeal is concerned, however, I can see no reason for interfering, nor do I think we have any right to interfere, with the discretion of the judge who has imposed this condition. I think, therefore, that the appeal fails.

MACKINNON, L.J.: I agree. The order of the judge was one which he made in doing his best to try to do justice between the parties. It seems to me that he had an insoluble problem, but I cannot see that the order which has been made is wrong. Unless I can see that he went wrong in the exercise of his discretion, I do not think it is proper for this court to interfere. Counsel for the appellant has put forward reasons why there is great hardship on his client. We have not heard counsel for the respondents, but he would have been equally in a position to say that there must be grievous hardship on his client if this appeal succeeded. As I say, the problem of how to do justice to both of them is so difficult as to be almost insoluble. I cannot say that the judge's method of deciding between them was wrong, and, therefore, I think that this appeal fails.

GODDARD, L.J.: I agree. I realise to the full the grave difficulties under which hotel proprietors and boarding-house and apartment house keepers are carrying on under war conditions. In fact, I should think that, as a business, there are very few other businesses in the great towns which have been so badly affected as theirs. I can understand that they think themselves, perhaps rightly, entitled to very sympathetic treatment under this Act. On the other hand, the landlords have the ground rent to pay. Some of them have to live out of the rents which they obtain. The great difficulty which is in the way of this court's interfering with the decision of the judge seems to me to be this. Under the Courts (Emergency Powers) Act, 1939, the court, be it the master or the judge, is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him, and very often with no dispute as to the facts. The position simply is that the man either cannot pay at all, or cannot pay in full, and does not know how he is going to pay. Then one has to consider whether his business is to go altogether, or whether the landlord is to get nothing, or what is to be done. There are many things to be taken into account.

I myself should want to take into account the fact as to how far it is right that a man should go on living in another person's property and pay nothing. It may be that some judges would take the view: "I shall not let you, the landlord, distrain. I shall not let you do that, because I want to preserve the tenant's goods for him. However, the tenant cannot go on living in the landlord's house paying nothing. The tenant must go out of the house." In some cases, that might suit the landlord, because he might be able to let again, though with this sort of property in Cromwell Road he cannot. The truth is, as MacKinnon, L.J., has said, there are no principles to guide one. One has to do the best one can. I do not think that this court ought to interfere with the discretion which the judge has exercised after an obviously very careful hearing unless it can come to the conclusion that he has done something unjust. I cannot see that he has done anything which is unjust here, because he had to take into account the position of the plaintiffs as much as the position of the defendant. The Act does make the position of the defendant a crucial matter, but, at the same time, one cannot altogether avoid taking into account the position of the creditor. Therefore, I do not think that it would be right for this court to interfere with what is, after all, just a matter of discretion. If I exercised my discretion, I should be just as likely to be wrong as the judge.

Appeal dismissed with costs.

Solicitors: *Gellatly, Son & Taylor* (for the appellant); *McKenna & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

HALL *v.* HALL (BY HIS GUARDIAN).

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), **December 12, 1939.**]

Divorce—Incurable unsoundness of mind—Period of care and treatment—Pauper lunatic "discharged not recovered" to workhouse—Necessary certificates—Lunacy Act, 1890 (*c.* 5), *s.* 25—*Matrimonial Causes Act,* 1937 (*c.* 57), *s.* 2 (*d*).

A pauper lunatic was discharged not recovered from a mental hospital to a poor law institution. The mental hospital duly certified that he was a lunatic not recovered, and a proper person to be kept in a workhouse as a lunatic, but the medical officer of the workhouse did not then certify that the accommodation in the workhouse was sufficient for the lunatic's proper care and treatment nor that the lunatic's condition was such that it was not necessary that he should be kept separate. The Lunacy Act, 1890, s. 25, requires that these certificates shall be given. The lunatic's wife subsequently petitioned for divorce on the ground that her husband was incurably of unsound mind and had been detained for the statutory period:—

Held: the omission of the medical officer of the workhouse to give the second certificate made it impossible for the court to find that the husband had been for at least 5 years immediately preceding the presentation of the petition detained in pursuance of any order under the Lunacy Acts, 1890-1930.

[EDITORIAL NOTE. The lawful detention of lunatics is subject to statutory requirements and these must be strictly complied with before a decree can be granted under the 1937 Act.

A As to Divorce on the Ground of Insanity, see HALSBURY, Supp., Divorce, para. 981; and for Cases, see DIGEST, Supp., Husband and Wife, Nos. 3015a-3015e.]

Wife's Defended Petition for dissolution of marriage as amended. The facts are fully set out in the judgment.

B The Lunacy Act, 1890, s. 25, provides as follows:

> Where a pauper lunatic is discharged from an institution for lunatics, and the medical officer of the institution is of opinion that the lunatic has not recovered and is a proper person to be kept in a workhouse as a lunatic, the medical officer shall certify such opinion, and the lunatic may thereupon be received and detained against his will in a workhouse without further order if the medical officer of the workhouse certifies in writing that the accommodation in the workhouse is sufficient C for the lunatic's proper care and treatment, separate from the inmates of the workhouse not lunatics, or that the lunatic's condition is such that it is not necessary for the convenience of the lunatic, or of the other inmates, that he should be kept separate.

Leslie Brooks for the petitioner.

A. H. Ormerod for the respondent.

D

Sir Boyd Merriman, P.: This was a wife's petition, originally based solely on the ground that her husband was incurably of unsound mind and had been detained for the statutory period under the provisions of the Lunacy Acts. There was the clearest possible evidence that the E husband was of unsound mind and that there was no hope whatever of his recovery, but, when the documents relating to the detention of the husband came to be examined, it appeared that he, being a rate-aided patient who had been received into the Banstead Mental Hospital on May 13, 1927, and was discharged under sect. 25 on Nov. 21, 1934, F and admitted to the Leavesden Mental Hospital, Abbots Langley, Hertfordshire. As that certificate shows, the discharge purported to be made under sect. 25. I was informed that what was called the Leavesden Mental Hospital was, in fact, an institution which had formerly borne the name of the Leavesden Workhouse, and sect. 25 enables pauper G lunatics to be discharged not recovered to a workhouse, but only on certain conditions—namely, that the medical officer in the institution in which he is detained under the reception order is of opinion that the lunatic is not recovered, and is a proper person to be kept in a workhouse as a lunatic, and that he certifies such opinion. That condition, I think, H was fulfilled in this case, and I need say no more about it. The section goes on to provide that a lunatic may thereupon be received and detained against his will in a workhouse without further order, if the medical officer of the workhouse certifies, in writing, that the accommodation in the workhouse is sufficient for the lunatic's proper care and treatment separate from the inmates of the workhouse not lunatics, or that the

lunatic's condition is such that it is not necessary for the convenience of
the lunatic, or of the other inmates, that he should be kept separate. It
will be seen, therefore, that, unless this second condition is fulfilled,
there would be no authority for receiving and detaining a lunatic in the
workhouse without further order. In other words, the discharge from
the mental institution would operate to bring the reception order to an A
end.

Accordingly, I adjourned the case to enable the parties to make further
inquiry as to whether or not the second condition had been fulfilled,
there being on the face of the documents no evidence whatever that it
had been so fulfilled. Counsel for the petitioner now tells me that he is B
unable to satisfy that condition, and counsel appearing for the Official
Solicitor, who is the guardian *ad litem*, carries the matter further by
telling me that the London County Council, who happen to be the
authority concerned, have been communicated with in detail, and are
unable to produce any evidence that this condition was ever complied C
with. That being so, it is quite clear that it is impossible for me to find
that this particular husband was for the period of at least 5 years
immediately preceding the presentation of the petition—for this discharge
occurred within those 5 years—detained in pursuance of any order under
the Lunacy Acts, 1890-1930. D

I wish to add only one word. In the course of the discussion, counsel
used the phrase that it was merely a technical point. Persons detained
under the Lunacy Acts are detained against their will, in their own
interest and in that of the public, but upon certain statutory conditions
which must be strictly fulfilled, and I do not regard it as a mere technicality E
that those instructions should be strictly fulfilled. Similarly,
under the Matrimonial Causes Act, 1937, however clearly it is proved
that a person is of hopelessly unsound mind, and for however long a
spouse may have been of hopelessly unsound mind, for the purpose of
obtaining a decree of divorce it is necessary to prove that he or she has F
been continually under care and treatment for the statutory period, and
care and treatment are defined, so far as this case is concerned, as meaning
that a spouse is detained in pursuance of an order under the Lunacy
Acts, 1890-1930, and not otherwise. There again, therefore, there is
no room for any latitude of interpretation. The statute must be strictly G
complied with in that sense, and in that sense only is it permissible to
use the words that it is a technical point which is involved. What is
really involved is strict compliance with two statutes, at which I am
obliged by law to look.

It happened, however, that in the course of the hearing it became H
abundantly clear that the petitioner in this suit had another cause of
action. She put in as part of the matrimonial history an order made in
the South-Western Police Court on June 28, 1909, which adjudged that
she was no longer bound to cohabit with her husband, on the ground that
he had been guilty of persistent cruelty and also of wilful neglect to

provide reasonable maintenance, and by such cruelty and neglect had caused her to leave him and live separate and apart from him. Accordingly, while adjourning the petition as it then stood for further inquiries, I gave the wife leave to amend her petition by adding a charge of cruelty, if she should be so advised. That amendment has been made, and she A has given evidence in support of the charge, which is abundantly proved. On at least two occasions, and, I think, on more, her husband had actually been sent to prison for assaulting her before this separation order was made, and I have no doubt whatever that he was guilty of persistent cruelty towards her.

B That being so, there only remains the question of her own misconduct. She did not see or hear of her husband for practical purposes after 1909. He never complied with the order, which was not very large, for her maintenance or that of the child, and some 20 years later she met a man with whom from 1928 she has been committing adultery and with C whom she has been living. I am bound to say that it seems to me to be the sort of case in which the court ought to exercise discretion in the wife's favour. I accordingly grant her a decree on the ground of her husband's cruelty.

Decree granted on amended ground.

D Solicitors: *Stanley Attenborough & Co.* (for the petitioner); *Official Solicitor* (for the respondent).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

E

MOORGATE ESTATES, LTD. v. TROWER AND BARSTOW.

[CHANCERY DIVISION (Farwell, J.), **December 15, 1939.**]

Mortgage—Insurance—Insurance against war risks—Breach of covenant—Impossibility of performance—Waiver.

F *Emergency Legislation—Proceedings commenced before coming into force of Courts (Emergency Powers) Act,* 1939*—Proceedings for foreclosure—Taking "any step in any such proceedings"—Leave of court—Courts (Emergency Powers) Act,* 1939 (*c.* 67), *s.* 1 (2) (*b*).

The defendants were mortgagees of certain buildings owned by the plaintiffs. The mortgage deed contained, *inter alia*, a covenant to keep G the buildings insured "against loss or damage by missiles or projectiles from or fired at aircraft." It was further provided in the mortgage deed that the defendants' power of sale should become immediately exercisable upon the plaintiffs failing to observe or perform any of the covenants contained in the mortgage. From the facts, it appeared that between 1936 and Jan., 1939, the defendants never objected to the plaintiffs omitting to insure the mortgaged property against war risks H as provided by the mortgage deed. In Jan., 1939, however, they intimated to the plaintiffs that the mortgage had become repayable, owing to the plaintiffs' failure to insure against war risks. It was found on the evidence that, although insurance against war risks had become impossible at that time, it had been possible in 1936, when the parties concluded their agreement. The plaintiffs asked for a declaration that they were not bound to comply with the defendants' notice to pay off the money secured by the mortgage, and the defendants counterclaimed for an account, for payment of the amount due under the mortgage, for the appointment of a receiver, for foreclosure or sale, and for possession. On behalf of the plaintiffs, it was contended that their failure to insure against war risks was caused in law by impossibility of performance, and that, failing that, the defendants had waived the performance by the plaintiffs of the covenant relating to such insurance. On behalf of the defendants, it was contended that the plaintiffs' failure to insure against war risks was a breach of the covenant relating thereto. Regarding the defendants' counterclaim, it was contended that they were not entitled to proceed, as they had failed to obtain leave as provided by the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*b*). Against that, it was contended that, as the defendants had instituted their counterclaim and set it down for trial prior to the coming into force of the Courts (Emergency Powers) Act, 1939, they were not taking "any step" in the proceedings such as would require the leave of the court :—

HELD : (i) as, on the facts, it had been proved that insurance against war risks had been possible for some time after the making of the contract, there was no impossibility of performance, and, consequently, there was a breach of the covenant relating to insurance against war risks.

(ii) this was not a case of frustration, but could only be a breach of an implied term that, upon such insurance becoming impossible, neither side would be entitled to rely upon the failure to comply with the covenant. No such term could, however, be implied in this case.

(iii) the defendants had not waived the performance by the plaintiffs of that covenant, and the plaintiffs were not entitled to the declaration asked for.

(iv) regarding the counterclaim, it could not be said that the defendants were taking "any step" in proceedings which had been set down for trial before the coming into force of the Courts (Emergency Powers) Act, 1939, and, consequently, the counterclaim must succeed without the leave of the court having to be obtained.

(v) the defendants were entitled to an account and to the appointment of a receiver, the latter remedy not being one for which the leave of the court is required by the provisions of the Courts (Emergency Powers) Act, 1939.

(vi) the defendants were also entitled to foreclosure *nisi*, but not to foreclosure absolute or sale, for which remedies the leave of the court must first be obtained.

[**EDITORIAL NOTE.** The main question here is whether there could be read into the mortgage deed a term that a covenant to insure against war risks would become unenforceable in the event of it becoming impossible to obtain such insurance. It was shown, however, that it had been possible to obtain such insurance for several months after the date of the mortgage, although it subsequently became impossible, and the court found no difficulty in holding, taking into consideration the fact that the security for the money advanced was a building and the land in the city of London, that no such implied term as that contended for by the plaintiff could have been present to the minds of the mortgagees, more especially as they were trustees and would require the most perfect security possible. The main point argued under the Courts (Emergency Powers) Act, 1939, on the mortgagees' counterclaim will be of only transitory importance, as it is unlikely that, after the next few months, the courts will be concerned with proceedings which have been instituted before the commencement of the Act.

AS TO IMPLICATION OF TERMS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451 ; and FOR CASES, see DIGEST, Vol. 12, pp. 607-613, Nos. 5028-5066.]

ACTION for a declaration that notice to repay money secured by a mortgage need not be complied with, and a counterclaim for an account of moneys due under mortgage, repayment, appointment of receiver, foreclosure and possession.

Rt. Hon. Sir William A. Jowitt, K.C., and *Gerald A. Gardiner* for the plaintiffs.

A *Charles E. Harman, K.C.*, and *L. M. Jopling* for the defendants.

FARWELL, J.: The plaintiffs in this action are a company who are the mortgagors of certain buildings in the city of London mortgaged to the defendants for a large sum of money. The claim in the action
B by the plaintiffs is for a declaration that the defendants were not entitled to give, and that the plaintiffs were not bound to comply with, a notice to pay off the mortgage money, and costs, and such further or other relief as to the court may seem just. The defendants join issue with the plaintiffs on that claim, and they counterclaim for an account to
C be taken of what is due to the defendants under the mortgage, for payment of the amount due, for the mortgage and registered charge to be enforced by foreclosure or sale, and for the appointment of a receiver, and delivery of possession of the mortgaged premises.

The facts are these. On Mar. 25, 1936, a mortgage was executed by
D the plaintiffs and defendants by which the plaintiffs mortgaged to the defendants buildings in the city of London situate at Moorgate and Coleman Street and known as Lloyds Bank Buildings. At that time, the plaintiffs were registered under the Land Registration Act, 1925, as the proprietors subject to the mortgage. The land and premises
E were of very considerable value, very much in excess of the amount secured by the mortgage. Under the terms of the mortgage, the plaintiffs covenanted with the defendants to pay to the defendants on Sept. 25 then next the sum of £155,000, with interest thereon in the meantime at the rate of £4 per cent. per annum from the date thereof, and that, if
F the principal should not be so paid, to pay to the defendants interest at that rate by equal quarterly payments on June 24, Sept. 29, Dec. 25 and Mar. 25 in every year on the principal moneys for the time being remaining due. By cl. 2, it is provided as follows:

> . . . the [plaintiffs] as beneficial owners hereby demise to the [defendants] all
> G [the said premises] for all the unexpired residue of the term of years granted by the lease dated Mar. 25, 1936, and made between the [plaintiffs] and the Atlas Assurance Co., Ltd., except the last 10 days thereof.

By cl. 3, it is provided as follows:

> . . . the [plaintiffs] as beneficial owners hereby charge the land comprised under the heading "District London Parish or Place City of London Title No. L.N. 8119" with the payment to the [defendants] of the principal sum interest and other money
> H hereby covenanted to be paid by the [plaintiffs].

The mortgage contains the usual covenants with regard to the mortgaged property, but also contains a covenant by the plaintiffs during the continuance of the security:

> . . . to keep the said buildings and all property then or for the time being comprised in or subject to the security (hereinafter comprehensively called the said

buildings) insured . . . against loss or damage by missiles or projectiles from or fired at aircraft to the full value thereof in the Atlas Assurance Co., Ltd., or in some other insurance office or with underwriters of repute to be approved in writing from time to time by the [defendants] in the name of the [defendants] and that on default by the [plaintiffs] . . . in keeping the said premises insured as aforesaid the [defendants] may insure and keep the same insured at the [plaintiffs'] expense.

By cl. 8, it is provided as follows : A

. . . that if the power of sale shall not have become exercisable then the [defendants] will not before Mar. 25, 1946, call in the said principal sum of £155,000 or such part thereof as shall for the time being be outstanding or any part thereof.

By cl. 9, it is provided as follows : B

. . . that the [plaintiffs] shall not be entitled to pay off the said sum of £155,000 or any part thereof except the instalments therein mentioned before Mar. 25, 1941, unless the [defendants] shall go into possession or appoint a receiver of the mortgaged premises or take any other step to enforce their security but that the [plaintiffs] may after that date upon giving at least 3 calendar months' notice in writing to the [defendants] or their solicitors pay off all or any part of the principal moneys for the time being owing on their security by instalments of not less than £1,000. C

By cl. 10, it is provided as follows :

. . . that the power of sale shall become immediately exercisable by the [defendants] without the necessity of giving any notice in that behalf to the [plaintiffs] if . . . the [plaintiffs] break or fail to observe or perform any of the covenants or provisions on their part herein contained or implied. D

That mortgage having been executed, and the money having been advanced, the question arose with regard to the insurance policy. By a letter, dated Mar. 26, 1936, the plaintiffs' solicitors wrote to their agents as follows :

This matter has now been completed, and the insurance of the building against fire should, when it falls due for renewal, be transferred to the Atlas Assurance Co., Ltd. E

Again, on Apr. 2, 1936, they wrote to their agents as follows :

By the lease under which Moorgate Estates, Ltd., now hold the premises, the insurance must be effected with the Atlas Assurance Co., Ltd. F

Then the letter stated that the defendants were interested in the premises as mortgagees, and that their interest must be noted on the policy. On May 18, 1936, the defendants' solicitors wrote to the plaintiffs' solicitors as follows :

We thank you for your letter of the 15th instant and return the insurance policy herewith as it does not seem to us that the policy complies with the covenant by the borrowers in the mortgage dated Mar. 25, 1936. We would point out that the property should be insured to its full value, which, in accordance with the recent valuation and schedule of Messrs. John D. Wood & Co., amounts to £259,753. We must, therefore, ask that the insurance be increased to this, or approximately this, amount. Nor can we see that the building is insured against loss or damage by "missiles or projectiles from or fired at aircraft or by reason of riots" except so far as the damage is the result of fire caused by any of such events. We think that the policy should include all damages from such risks and not fire only. G H

In answer to that, the plaintiffs' solicitors wrote on May 20, 1936, dealing with the question of the additional insurance :

We are taking up the question of additional insurance and will let you hear from us again.

At the same time, the plaintiffs' solicitors wrote to their agents as follows :

> The policy with the Atlas Assurance Co., Ltd., No. 10501074, which you sent us, appears to insure the premises against fire, with certain exceptions, lightning, explosion of boilers, or explosion of gas used for domestic purposes or for lighting or heating the building, and does not appear to cover the additional risks mentioned above.

In the first paragraph of that letter, they said :

> Under the mortgage between the above company and Messrs. Trower and Barstow, the company are obliged, during the continuance of the mortgage, to keep the buildings and all property for the time being comprised in the mortgage insured against loss or damage by fire, damage by missiles or projectiles from or fired at aircraft, or by reason of riots.

The agents wrote back on May 21, 1936, as follows :

> We are in receipt of your letter of the 20th instant, the contents of which we note. There is at the moment no insurance cover against "riot" or "aircraft" damage, and we have to-day arranged with the Atlas Assurance Co., Ltd., to issue a cover note against this risk, which as soon as we receive we will forward to you.

On May 25, 1936, the Atlas Assurance Co., Ltd., by their manager, wrote to the plaintiff company's agents as follows :

> We are obliged by your remittance of £28 10*s.* 7*d.* in respect of the above policy and have the pleasure to forward official receipt, together with a suitable indorsement slip for attachment to the document.

On May 26, 1936, the defendants' solicitors wrote to the plaintiffs' solicitors as follows with regard to the insurance :

> We shall, therefore, hope to hear from you further regarding the additional insurance against loss or damage by "missiles or projectiles from or fired at aircraft or by reason of riots."

On May 28, 1936, the plaintiffs' solicitors wrote to the defendants' solicitors as follows :

> Further to your letter to us of the 26th instant, we now enclose an indorsement to be attached to the policy, in respect of the above premises, covering the further risks, as requested by you. We also enclose the policy, and shall be glad if you will kindly return both documents to us when you have inspected them.

That was acknowledged on June 2, 1936, as follows :

> We thank you for your letter of the 28th ultimo, and beg to acknowledge the insurance policy in respect of the above premises. We think, however, we should keep this here, in the usual way, on behalf of the mortgagees, with the title deeds.

The indorsement for the additional security was put upon the policy, and the matter remained there, in those circumstances, for the time being. It appears from the evidence that the additional security which was provided for by the additional term in the policy did not cover risks which the plaintiffs covenanted should be covered—namely, risks from enemy aircraft, missiles or projectiles from or fired at aircraft, or by reason of riots. Although the defendants' solicitors received the indorsement (and, if they did not themselves read it, it was read in fact by their managing clerk), neither they nor the plaintiffs' solicitors appear to have noticed the fact that the additional policy did not go far enough to be a compliance with the covenant in the deed. On Mar. 30, 1937, the defendants' solicitors asked to have the insurance policy, together with receipts, sent to them. That appears to have been done, but, again, no question was raised at all with regard to the inadequacy of the policy of insurance. On Jan. 26, 1939, however, the defendants' solicitors appear to have become aware of the fact that the policy was not a compliance with the covenant in the mortgage, because they wrote to the plaintiffs' solicitors on that date as follows :

> In the mortgage of Mar. 25, 1936, made between your clients, the Moorgate Estates, Ltd., and Mr. W. G. Trower and Mr. J. A. T. Barstow of our firm, there is a covenant that your clients will insure the building against " loss or damage by fire, damage by missiles or projectiles from or fired at aircraft " etc. This clause obviously includes war risks. As we understand your clients have failed to insure against these risks, there has been a breach of the covenant in the mortgage. In these circumstances, the principal money of £155,000 secured by the mortgage has become immediately repayable. The mortgagees do not feel justified in allowing this mortgage to remain outstanding in view of the risk attaching to it. Would you kindly take this letter as notice to your clients to pay off the mortgage immediately. We shall be glad to hear that arrangements are being made for this purpose.

In answer to that, the plaintiffs' solicitors wrote on Jan. 27, 1939, as follows :

> We confess that we do not fully appreciate the letter, and think you must have written it without reference to the correspondence which took place at the time. On May 18, 1936, you wrote us drawing attention to the insurance covenant in the mortgage, to which you now also draw attention. We took the matter up with the insurance company, and obtained the full cover which insurance companies would then give in respect of the risk, and sent the appropriate indorsement to you on May 28, which you duly acknowledged on June 2. This policy has been renewed ever since, and is still in force. Your clients have throughout been aware of and accepted such policy as being a compliance with the covenant of the mortgage, and we cannot, therefore, accept the view of your letter under reply that there has been any such failure to insure against any risks provided for by the mortgage as would entitle your clients to call in the mortgage. Further, as is well known from statements made on behalf of the government in the House of Commons and also statements made by insurance companies, it is not possible to insure against damage resulting from enemy aircraft. We have been in constant touch with insurance brokers on this matter, and if it had been possible to effect such a policy our clients would, of course, have taken it out. As the covenant in question has become impossible of performance through circumstances entirely beyond the control of our clients, we cannot accept the contention of your letter that the circumstances entitle your clients to call for the mortgage to be paid off immediately.

That letter was not strictly accurate, because, although it was impossible at the date when it was written to insure against such war risks, it had not been impossible during the whole time the mortgage was on foot, because, from the evidence I have heard, until Oct., 1936, such a policy could be effected. I am not suggesting for a moment that the plaintiffs' solicitors had that in mind, or possibly were aware of it, at the time they wrote that letter, but it was not strictly accurate, having regard to the evidence I have heard here. On Feb. 2, 1939, the plaintiffs' solicitors wrote as follows :

> . . . the points of view of our respective clients were irreconcilable. We have obtained the opinion of leading counsel that your clients are not entitled at law to call in the money, and accordingly we have received instructions from our clients to take the necessary proceedings to have the point decided by the court.

On that, the writ in this action was issued.

There is very little evidence on this matter which has reference to anything I have to decide. It appears that in Mar., 1938, the plaintiffs had it in mind to pay off the mortgage and make other arrangements with regard to the property. One of the members of the plaintiffs' firm of solicitors interviewed one of the defendants, Trower, and discussed with him whether his clients would permit the mortgage to be paid off at once. As the result of that conversation and telephone message, Trower informed the plaintiffs' solicitors that his clients would accept payment off, although they were not very willing to do so, because the mortgage was in fact a good security, but they would permit it only at a considerable cost, because there would have to be a premium or bonus paid for the privilege of paying off before the due time. I do not myself see that there is very much relevance in that, and really the whole matter comes down to whether the plaintiff company has committed a breach of the covenant in the mortgage with regard to insurance which would give rise to the right of the defendants to foreclose and re-enter and recover their money, or, in the circumstances, whether it is the fact that there has been no such breach, and that, therefore, the defendants are not in a position to call in their money at once. It seems quite plain, when one reads the terms of the mortgage and considers what has happened, that *prima facie* there has been a perfectly clear breach of the covenant in the mortgage. The plaintiffs have not, and never had, insured in such a way as to comply with the covenant for insurance which is contained in the mortgage. I think that there is little doubt that such an insurance could have been effected down to Oct., 1936. Also, however, there is no doubt that, from the evidence that I have heard, since Oct., 1936, any such policy was quite impossible to effect. No insurance company, and no member of Lloyd's, would accept such a risk, and such a policy could not be procured from any reputable firm or company. I think, therefore, that one must take it that, as from Oct., 1936, a full compliance with the terms of the covenant in question became impossible. In those circumstances, is the plaintiff company relieved from the necessity of complying with the covenant, or is the covenant still an enforceable covenant which they have failed to observe, and which, therefore, has given the defendants the right to recover their money immediately ?

The plaintiffs have put their case, as I understand it, upon three grounds. It is not suggested (and, I think, it is quite properly not suggested) that this is a case of frustration in any true sense of the term at all, and the cases about frustration of contracts very rightly have not been referred to. The contract itself remains, and one term of it has, according to the plaintiffs, ceased to be enforceable, and, therefore, as I say, it is not a case of frustration at all. However, the plaintiffs say, in the first place, that it was an implied term of the contract, when it was entered into, that, if such an insurance policy was an impossibility, then neither side should be entitled to rely upon the failure to comply with that covenant. It is pointed out (and truly pointed out) that the defendants are given the right to insure themselves in the event of the plaintiffs failing to effect the necessary insurance, and it is said that it was clearly not in the contemplation of either of the parties at that time that such an insurance as was required by the covenant was something which could not be obtained. The very fact that the defendants were given the right to effect the policy themselves in the event of the failure of the plaintiffs to do so is an indication that both sides did not in the least have it in mind that such a policy might not be able to be effected at all. On the other hand, however, it appears to me to be extremely difficult in this case to come to the conclusion that there was any such implication as that which the plaintiffs suggest. The plaintiffs say that this particular term of the mortgage was something which was not to be enforced, both parties intending the covenant to be read as though it was not to be enforced unless such a policy could be effected. It is to be noticed that, if that had been the intention of the parties at the time, there would seem to have been no difficulty about putting a proviso in the covenant to give effect to such an intention. No such proviso is to be found, and I confess that I feel the greatest possible difficulty in coming to the conclusion that there was ever any such implied intention on the part of either party at the date of the covenant. There was at that time no impossibility about effecting that form of insurance, and there was no impossibility for some little time after. In connection with that, one has to bear in mind the position of the defendants. The defendants were advancing a very large sum of money, and were taking as security for that money a charge upon land and buildings in the city of London. It was obviously of the greatest importance to them that the buildings should be insured for an adequate sum, so that, if the buildings were destroyed, there would be a sum of money to represent the buildings, which would be available as security for the loan which they had made. One of the possible ways in which the buildings in question might be destroyed was, by enemy action, and it is difficult to suppose that the defendants were willing to allow their money to remain on mortgage of buildings which were wholly unsecured so far as that particular form of possible destruction went. In fact, the fact that they were not so willing is apparent, I think, from the fact that they did insist upon—or they got, at any rate—a form of covenant providing in terms for insurance against that possible risk. I myself find it impossible to see how, in this case, there was any such implication as is suggested. I cannot bring myself to think that the defendants ever contemplated that that particular portion of the covenant relating to insurance against enemy action was something which was to be enforced only if such insurance happened at a particular time to be obtainable. In my judgment, the defendants, at any rate, did intend to obtain the particular form of security for their money which would be provided by such an insurance, and I am not at all satisfied that they would have been prepared to allow their money to remain outstanding merely because that particular form of insurance was no longer obtainable. In my judgment, there is no ground here whatever for saying that there was any such implied term in this mortgage as the plaintiffs seek to have read into the document.

If that be so, it is then said that, at any rate, in this particular case there is in some way an estoppel which prevents the defendants from setting up the claim which they now set up. I confess I share the great difficulty which counsel for the plaintiffs very frankly said he felt with regard to an estoppel. There is nothing here, so far as I can see, which can amount to any sort of representation upon which the plaintiffs acted to their detriment, and, so far as estoppel is concerned, I think that I need say no more about it. I can see no justification whatsoever for such a suggestion.

The other ground upon which it is sought to escape from this difficulty is this. It is said that the defendants have waived the performance of this particular covenant, and, therefore, can no longer enforce it. In my judgment, there has been no such waiver at all. No doubt the defendants did not read, or did not appreciate, that the form of additional security was not wide enough to be a compliance with the covenant. Whether they read it or not, they did not, at any rate, take any objection to that form of policy, and it seems that both sides, the plaintiffs' solicitors and the defendants' solicitors, were under the same mistake of fact in thinking that the policy with the indorsement upon it was sufficiently wide. However, apart altogether from that, I can see no ground for suggesting that, even if the defendants were willing to permit the policy in that form to remain in that form for a year, or for two years, there is any sort of waiver whatever so long as the policy remained on foot and they waived their right to a strict performance of the covenant, and, indeed, even if there was any such waiver, it was something which was supported by no consideration whatever, and clearly any such waiver as that could not be enforced against the defendants, in all the circumstances.

That being so, it is, in my judgment, quite a plain case of a breach by the plaintiffs of the terms of the covenant in question. One appreciates the hardship upon the plaintiffs. They have entered into a covenant which they are unable to perform, and their position is one of great difficulty, and one feels, if I may say so, sympathy with them. On the other hand, one must take the point of view of the defendants. I know not whose money the money advanced on mortgage is. I will assume for the moment that it is money which is trust money. The defendants have invested money which they hold on trust, assuming that to be so, upon a 4 per cent. security which they thought was a safe security for trust money. The safety of the security depended, and necessarily depended, very largely upon the protection of the property by the proper and necessary insurance, and, therefore, it was vital to the defendants to see that a wide enough covenant was put into the mortgage to cover all these risks. If they were bound to allow their money to remain out on mortgage for the full period, and had no remedy, notwithstanding the fact that one of the terms of the mortgage which enabled them to feel reasonably secured was no longer enforceable, that would put them into a position where they might find themselves in the greatest possible difficulty if the buildings were unfortunately destroyed and the security for their money very largely disappeared.

Taking the position at large, I think that the position is this. The plaintiffs and the defendants have entered into a contract under which the plaintiffs have agreed and covenanted to do certain things. They have failed to carry out their covenant, not, as it happens, through any fault of their own, but, nevertheless, they have failed to perform the covenant. As a result of that failure to perform the covenant, the defendants are put in a position where they can call in their money, and have done so. In my judgment, that is something which the defendants were entitled to do, and, accordingly, the plaintiffs are not entitled to the relief which they seek in this action by the form of declaration which they ask. Unfortunately for them, they have failed to comply with one of the covenants in the mortgage, and the result follows that the defendants are in a position now to call in their money, as they have done. So far, therefore, as the action itself is concerned, the plaintiffs, in my judgment, have failed to establish their right to relief which they sought, and, accordingly, the action must be dismissed with costs.

That leaves the question of the counterclaim to be considered. By the counterclaim, the defendants seek an account of what is due under the mortgage payable by the plaintiffs to the defendants of the sum of £155,000 with interest, they seek that the mortgage and registered charge may be enforced by foreclosure or sale, and they seek a receiver, and delivery of possession of the mortgaged premises. To that, objection has been taken under the Courts (Emergency Powers) Act, 1939, and it is said that the defendants are not entitled to proceed with their counterclaim at all, because they have not taken the step which it was necessary for them to take before they could proceed—namely, an application for leave by summons to proceed. That is said to arise under sect. 1 (2), which provides as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court. . . . (*b*) to institute any proceedings for foreclosure or for sale in lieu of foreclosure, or take any step in any such proceedings instituted before the commencement of this Act . . .

These proceedings—that is, the counterclaim—were instituted before the commencement of this Act, and, therefore, in order to bring this case within the prohibition in the Act, it is necessary to establish that, by the hearing of the counterclaim, the defendants (the plaintiffs to the counterclaim) are taking a step in proceedings instituted before the commencement of this Act. Whether or not that is so must depend upon what is

meant by taking any such step. In my judgment, the words do not
refer to the hearing of an action which was set down and ready for
trial before the Act came into force. Taking "any step in any such
proceedings" means, in my judgment, taking any interlocutory step
before the action gets to the stage where it is set down and ripe for trial.
A Once the action is set down, it is no longer possible to get a summons
before the master in the proceedings. The matter has passed out of the
hands of the master, and is solely a matter for the court, and I cannot
bring myself to think that the Act contemplated that a summons should
be taken out before the judge who is going to hear the action and the
B counterclaim for leave to hear the action. In my judgment, that is not
what was intended by this Act. There is nothing, in my view, to
prohibit the opening and the hearing of such an action as this, commenced,
as it was, before the Act came into force. No doubt the result of the
hearing, if an order is made for relief such as sale or foreclosure, the right
C to proceed on the judgment so obtained, is something which the court
requires should only be taken with the sanction of the court under the
Act. However, in my judgment, when the action is one which was commenced
before the Act came into operation (the action itself was ready,
in the sense that all the necessary preliminary steps had been taken, and
D the action had been set down and was waiting for trial), there is nothing
in this Act which prevents that action coming on for trial and being
heard by the judge without any leave under this Act, although, as I say,
of course the right to enforce any judgment so obtained may be something
which the plaintiff can only do by the leave of the court, as provided by
E this Act.

If that be so, it follows, in my judgment, that the defendants are
entitled to an order upon the plaintiffs, and that the defendants are
entitled to the account which they seek. They are also entitled, in my
judgment, to the appointment of a receiver, because, so far as I can see,
F the Act itself does not necessitate any express leave for the appointment
of a receiver by the court. They are also entitled to a foreclosure *nisi*,
but they cannot proceed, either by foreclosure absolute or otherwise, or
by sale, to enforce that judgment, and, before they can take steps to
enforce the judgment by those means, they must obtain the leave of the
G court by a summons, as provided by the Act itself. The relief to which
I consider the defendants are entitled is relief which, in my judgment,
I am entitled to give them, and there is nothing in the Courts (Emergency
Powers) Act, 1939, which disentitles them to that relief. The whole
object of the Act is to prevent a person or persons from enforcing a
H judgment against a defendant without the leave of the court, to give
the defendant an opportunity of showing that his failure to pay the debts
which he owed, or to satisfy the judgment, is due, directly or indirectly,
to the war. There is nothing, in my view, which prevents a plaintiff in
such a case as this from claiming an order for an account or for foreclosure
nisi, nor for the appointment of a receiver. In those circum-

stances, I propose to give the defendants that relief, and the plaintiffs must pay the costs of the counterclaim.

Action dismissed with costs. Judgment for defendants on counterclaim with costs.

Solicitors: *J. D. Langton & Passmore* (for the plaintiffs); *Trower, Still & Keeling* (for the defendants).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

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pplied. CLIFFORD *v.* CLIFFORD.
.948] 1 All E.R. 394.

NASH (OTHERWISE LISTER) *v.* NASH.

[Probate, Divorce and Admiralty Division (Langton, J.), **December 6, 7, 8, 12, 20, 1939.**]

Divorce—Nullity—Lack of sincerity—Time of knowledge of husband's impotence—Motives inducing marriage.

The parties were married on Jan. 18, 1939, the respondent being then 74 years of age, while the petitioner, who prior to the marriage had been his secretary and companion, was then 34 years of age. The respondent made unsuccessful attempts to consummate the marriage, and then told his wife, after the first week of the marriage had elapsed, that he did not intend to make any further attempts, as he did not wish to have children by her. About this time, also, he began to deliver to her a number of written communications, in one of which he said: "You can get the marriage annulled." After much bickering and unhappiness, the petitioner left the respondent on Feb. 25, 1939, and 4 days later filed a petition for nullity on the ground that the marriage had not been consummated by reason of the respondent's impotence, or, alternatively, by reason of his wilful refusal to consummate the marriage. The respondent by his answer denied his incapacity, the refusal to consummate, and alleged want of sincerity on the part of the petitioner:—

Held: (i) it was clear on the face of the respondent's admissions that he had been guilty of wilful refusal to consummate the marriage.

(ii) sincerity with which the court is concerned has reference only to the sincerity of the plea, and is not concerned with the motives that induced the petitioner to marry the respondent.

(iii) the petitioner had not been lacking in the necessary sincerity. There had been no kind of delay in presenting her petition, and she had done nothing to approbate the marriage, nor had she obtained any of the benefits, material or otherwise, which a woman has a right to look for in marriage.

[**EDITORIAL NOTE.** The plea of lack of sincerity is wholly concerned with events after the marriage, and is not concerned with the motives which induced the marriage. Thus it cannot be said that a young woman marrying an old man with a view to her material and financial advancement is precluded from obtaining a nullity decree by reason of the motives which induced her to marry.

As to Lack of Sincerity, see HALSBURY, Hailsham Edn., Vol. 10, pp. 643, 644, paras. 942, 943; and for Cases, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2328-2338.

Cases referred to:

(1) *G.* v. *M.* (1885), 10 App. Cas. 171; 27 Digest 351, *3339*; 53 L.T. 398.

(2) *L.* v. *L.*, [1931] S.C. 477; Digest Supp.

Wife's Defended Petition for a decree of nullity of marriage on the ground of the respondent's incapacity, or, alternatively, on the ground of his wilful refusal to consummate the marriage. The facts and arguments are fully set out in the judgment.

Gerald A. Gardiner for the petitioner.

Richard A. L. Hillard for the respondent.

A LANGTON, J.: In this case, the petitioner asks for a decree of nullity, on the ground that her marriage has never been consummated by reason of the impotency of her husband, or, alternatively, by reason of his wilful refusal to consummate the marriage. By his answer, delivered on Mar. 9, 1939, the respondent denied his incapacity, and B denied also the refusal to consummate. Some months afterwards, on June 16, 1939, this answer was amended to include the plea that the petitioner was guilty of want of sincerity in presenting the petition. The case has taken an unconscionable time to try, and this prodigal expenditure of time has been for the most part due to the personal C eccentricities of the respondent. It is only fair to a hardworking and conscientious craftsman to add that the respondent's case has been presented with great ingenuity and imperturbable good temper by his counsel. As to the first two issues of impotency and wilful refusal, it will not be necessary for me to give a judgment in great detail. It will D be necessary hereafter for me to say something concerning the medical evidence touching on the respondent's sexual capacity, but, since he admitted at the trial (i) that he had in fact never consummated the marriage, and (ii) that he had not the slightest intention of doing so after the first week of the marriage had elapsed, his counsel considered E that it was unnecessary to debate that aspect of the matter any further. The respondent admitted that he had made two attempts to consummate the marriage without success. He further admitted that, after the failure of the second attempt, he informed his wife that he had no intention of making any further efforts, because he did not want F to have children by her. Finally, he admitted in the clearest terms that he intended to refuse to consummate the marriage, and that, from the day on which he made that statement to his wife until the day he gave evidence, he had neither offered nor intended to attempt to consummate. He did not suggest that his wife on her side had said or done anything G to put any difficulty in his way, and he agreed that on at least one occasion she had attempted to assist him. In the face of these admissions, it was abundantly clear that, impotent or not, the respondent was guilty of wilful refusal.

The greater part of the time which this case has occupied has been H devoted to the unusual question of want of sincerity on the part of the petitioner, and this is now the only outstanding issue in the case.

The first thing which appears to me to be necessary, and it is by far the most difficult part of my task, is to attempt to focus this issue as nearly as may be, and to delimit in a proper perspective the nature and bounds of the issue itself. The authority relied upon by both sides as being not only the *locus classicus* of the doctrine to be applied but also the alpha and omega of the doctrine itself is *G.* v. *M.* (1), in the House of Lords. In that case, the Earl of Selborne, L.C., said, at p. 186:

> My own belief is that, to whatever criticism the phraseology of learned judges in those cases may be open (and I must say that the adoption of that particular phrase "sincerity" seems, as the learned counsel said, to suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not,) I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred.

In the same case, Lord Watson puts forward his view of the matter as follows, at pp. 197, 198:

> The first plea against any consideration of the merits of this case was rested upon the rule as to "sincerity," or more correctly speaking, insincerity. I agree with the observations which have been made upon the English cases bearing upon that matter by my noble and learned friend the Earl of Selborne, L.C. It humbly appears to me that the expression is not a very happy one, and also that it has been used occasionally in circumstances which render it still more inappropriate. I think that when those cases are dissected they do show the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

Again, Lord Bramwell analyses the use of the word "sincerity" with considerable care, at pp. 201, 202:

> Now, one word as to this question of "sincerity." It is a most remarkable expression, a very curious word, and I am not at all sure that it has not resulted from this, that sincerity is a very important matter in ascertaining whether the spouse complained of is impotent or not, and sincerity has been dwelt upon for that purpose till at last it has been taken to be a separate head of objection to the complaining party's proceedings. It seems to me very strange. What the complainant does in a suit of this sort is to come to the appropriate court for a declaration of the truth: "I say that this man is impotent and was so at the time of the marriage, and I ask you to declare that fact." The very words of the summons are, "Declare the truth, that this man was impotent when he married me." The court say, "No we will not," or the argument is that the court ought to say, "No we will not—we know that it is true, but we will not say so"—why? In my opinion a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining, when she comes forward with her complaint of this wrong that he has done her, unless in some way or another he can show that he sustains some injury from the double matter of her not having complained earlier, and of her complaining now. In such a case I should indeed think that a law might be made (perhaps it exists, for aught I know,) that in some way or another the declaration of truth should be accompanied by some compen-

sation to him for the sort of injury which, as I have indicated, might have been done to him.

It is worthy of remark that, although in that case the parties were together after marriage for the better part of two years, and although the wife never raised the question of the impotency until after she had A herself given birth to an illegitimate child, and been charged with adultery by her husband, the House of Lords did not find that her plea was tainted by insincerity. It is also worthy of note that none of the opinions from which I have quoted seems to express complete satisfaction with the use made in this connection of the term "sincerity." It is, I think, B clear that their Lordships are of opinion that the word should not be held to be employed with all its usual implications, but should be treated as having a special and limited meaning.

Counsel for the respondent placed great reliance upon *L.* v. *L.* (2). The headnote of the case states both the facts and the findings with C considerable terseness and accuracy. As to this case, it should be observed that the parties had lived together for over 4 years before any action was taken by the pursuer, and that two out of the three judges in the Court of Session reserved their view as to whether knowledge of impotency prior to the marriage in all cases necessarily operates as D a bar to an action for nullity.

The view which I have formed from a consideration of these and other cases bearing on the point is that the "sincerity" with which the court is concerned has reference only to the sincerity of the plea, and has nothing whatever to do with either (*a*) the general character E of the petitioner as a sincere or insincere person, or (*b*) the conduct of the petitioner before her marriage or the motives which prompted her to enter into the marriage. In cases of the class to which *L.* v. *L.* (2) belongs—namely, cases in which the petitioner knew of the impotency before marriage—the knowledge is obviously of great importance as F shedding light upon the sincerity of the plea, and not upon the sincerity of the petitioner's conduct. To put the matter in another way, the court may well believe that a plea of this kind is not put forward with sincerity in a case where the petitioner knew of the disability in advance, but the decree will be refused, not because of the petitioner's knowledge, G but because of the insincerity of the petitioner's plea. Knowledge in such cases is only evidence of, and not an acid test of, insincerity. The task before me is, accordingly, to address my mind, not to the conduct or declarations of the petitioner before her marriage, but to the question of whether, since her marriage, she has been guilty of any conduct H which ought to estop her from having the remedy she seeks. Is there, in the words of the EARL OF SELBORNE, L.C., at p. 186:

> . . . any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she now seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.

Be it observed that the EARL OF SELBORNE, L.C., speaks of an "act . . . during the antecedent time." As I read this passage, and, indeed, as I understand the law, the antecedent time here referred to is the time which elapses between the date of the marriage and due ascertainment of the facts and the law, on the one hand, and the date when the plea is put forward, on the other.

In the present case, it has never been suggested, and, indeed, could not be suggested, since the respondent does not even now acknowledge his impotency, that the petitioner had any knowledge one way or the other concerning her husband's capacity before marriage. To my thinking, therefore, the point from which the petitioner's conduct falls to be examined commences from the time when she herself became convinced that her husband was impotent. In order to ascertain this moment with reasonable precision, it will be necessary to enter somewhat more exhaustively upon certain questions of fact.

The parties met in Dec., 1938. The petitioner was then a young woman of 34 years of age, and the respondent an old man of 73 years of age. The petitioner entered the employ of the respondent as a typist and secretary-companion. Her duties consisted of work as a typist during the morning and of attendance upon the respondent as a companion between the hours of 6 p.m. and 10 p.m. For these calls upon her time and energy she was remunerated at the somewhat miserly rate of £2 per week. Against this, however, must be set the facts that she obtained at least one meal a day from the respondent, and that she was never called upon to do any serious work between 6 p.m. and 10 p.m. At this time, the petitioner was living by herself in a small flat, the landlady of which, Mrs. Hidden, was called before me as a witness. At the hearing of the action, some reliance was placed upon alleged declarations which were said to have been made by the petitioner to Mrs. Hidden during the period of her employment as secretary-companion to the respondent. During the time which elapsed between the filing of this petition and the hearing of the case, Mrs. Hidden suffered a very serious accident, and was indeed brought to court in an ambulance. Owing either to the shock occasioned by her injury or to natural lapses of memory, she proved unable to give any very clear evidence, and I have not felt it possible to found any conclusion upon her testimony. Her recollection, both of her own statements and of those of the petitioner, seemed to be exceedingly hazy, and she was so ready to agree with almost any suggestion made by either counsel that one could not help feeling that the trend of her evidence would almost certainly be decided by the amount of pressure put upon her to give that evidence. Her name was not mentioned by either counsel in their final addresses before me.

On Dec. 23, 1938, the respondent startled his secretary by placing upon her typewriter before her arrival in the morning an advertisement for insertion in THE TIMES announcing their engagement. The petitioner, after expressing her surprise, not unnaturally asked for time to consider the proposal. To this request the respondent replied that he could not give her time, and that he required an answer on the spot. He epitomised, I have no doubt truthfully, his own attitude towards the world by observing, "What I wants, I takes," and the petitioner so far yielded to his request as to agree that she would be engaged to him for a period of 4 months, with the option of rejecting him after that period if she so desired. This period of 4 months was selected because the petitioner was already under contract with the respondent to share with him a world cruise as his secretary-companion. Events then developed with remarkable swiftness. Within a very short time, a matter almost of hours, the respondent determined to force the pace, and persuaded the petitioner to agree to marry him on his seventy-fourth birthday—namely, on Jan. 18, 1939. The petitioner has very frankly admitted that, at the time when the respondent delivered his sudden and imperative proposal, she was herself engaged in an association with a young man of her own time of life whose name it is quite unnecessary to mention. With the same commendable frankness, she has told me how at first she determined to continue this association, notwithstanding her marriage, and in fact approached Mrs. Hidden with the idea of securing a rendezvous after the marriage had taken place. Later on, however, she felt some qualms of conscience, and eventually, deciding that such a course of action would be dishonourable, she broke off the association some time early in January, and did not resume her meetings with the young man in question until after she had parted from her husband. Since the petitioner has been much aspersed in the course of this case for this portion of her conduct, I desire to say quite plainly, first, that I believe her evidence as she gave it, and, secondly, that I consider the aspersions made upon her in this regard to be unfair. No one, of course, could pretend to excuse her first determination to continue her association after marriage, but the determination was not persisted in or acted upon, and was in fact reversed within a very short time of being made, and in good time before her marriage. Furthermore, it is only bare justice to remember on her side of the case that the respondent, on his own admission, sprang this proposal upon her without the faintest hint of warning, and demanded an instant reply, without affording her any interval for reflection. In such circumstances, only a man of the respondent's peculiar mentality, lacking as he is in any instinct of chivalry, and devoid of all consideration for the feelings and convenience of others, could possibly have thought it fair to drag this episode in his wife's career into the limelight of publicity, and endeavour to found upon it a defence for his own shortcomings.

During the early part of Jan., 1939, the respondent appears to have been moved to one of his rare gestures of generosity to the extent of providing £50 towards his wife's trousseau. During the same period, he was also moved to a repetition of what appears to be almost a common practice with him—namely, to propose marriage to another secretary. The petitioner having fallen ill towards the end of December, she was requested by the respondent to find and supply a substitute secretary. The respondent stipulated that the substitute should be young and attractive, and the petitioner appears to have performed the task set before her so faithfully that, within a few days of her engagement, the new secretary, Miss Seaton, also received a proposal of marriage. Questioned as to whether this conduct was in his view loyal or sincere towards the petitioner, the respondent agreed quite heartily that it was nothing of the kind, and described his own conduct in the following way:

> I was quite prepared to throw over Miss Lister and marry Miss Seaton. At my age, we take them as companions. That is all I want really, a companion. From the moment when I met Miss Seaton, I preferred her to my wife. She was much more attractive and younger.

Miss Seaton, however, excused herself on the ground of a prior engagement. The incident was forgotten by the respondent as a matter of no special importance, and preparations for the wedding continued. On Jan. 18, 1939, the parties were married, and started upon a somewhat curious honeymoon, of which they spent one night at Newbury and three at Weston-super-Mare. There were several attempts to consummate the marriage, and, if it were necessary for me to arrive at a determination, I do not think that I should have much hesitation in deciding that the respondent was impotent.

Almost from the outset, the marriage proceeded upon most unusual lines. As early as Jan. 26, the respondent began to deliver to his wife communications which he described in the witness-box as "ultimatums." It is not a little remarkable, in view of the defences which he has seen fit to put forward in this case, that in the first of these documents he writes: "You can get the marriage annulled." His explanation of what he really meant by this phrase was, as usual, not very clear, but he did not deny that he was there referring to the fact that the marriage had not been consummated, and that he intended to convey that, if a petition was presented by his wife, he would not defend the suit. Since he is in the habit of changing his mind for no apparent reason upon most of the determinations at which he has arrived, it is not surprising that he has made his present *volte-face* on this subject by defending this suit. It seems to me, however, that, in considering the sincerity of the petitioner's plea, it is not unimportant to observe that within 8 days of the marriage the respondent was inviting her in writing to take the very course which she shortly afterwards pursued.

The same communication of Jan. 26 contains also the following sentence: "I am bound to keep my adopted daughter." The passage refers to a young woman whose real name is apparently Joan McGlyn, but whom the respondent has adopted in a form of law which has in fact no legal effect, since the young lady had already attained her majority before the act of adoption. The respondent made no secret of the fact that he had proposed to, and had at one time ardently desired to marry, this young lady. I gather that she is sometimes known as Miss McGlyn-Nash, and, about the time when the respondent became engaged to the petitioner, she reappeared at the respondent's flat, and resumed her somewhat ill-defined position as an adopted daughter. A Miss McGlyn, or McGlyn-Nash, if that be her proper name, was not called before me, and I would not wish that anything contained in this judgment should seem to be a reflection upon either her conduct or her character. It is sufficient for present purposes to say that her continued presence at the respondent's flat after the marriage did nothing B to assist the harmony of that ill-assorted union. After an uneasy month of bickering and unhappiness, punctuated by frequent and contradictory ultimatums by the respondent to the petitioner, the petitioner left the respondent on Feb. 25, 1939. She left behind her a note the essential part of which is as follows:

> C You have made my life such a hell that I am leaving you for good. You will hear from my solicitors.

I do not imagine that it is a matter of much importance to attempt to discover what was the final or culminating incident of disagreement which prompted the petitioner's action in leaving the respondent. The D petitioner claimed that she was driven thereto by a most unreasonable and degrading proposal that the matrimonial home should be transferred to Ramsgate in intolerable conditions. She said that the conditions were that she was to go to Ramsgate in company with the respondent and Miss McGlyn, and that, whilst the respondent was to E occupy one flat, she and Miss McGlyn were to occupy another. If, as I understand to be the case, she had neither sympathy nor friendliness for Miss McGlyn, and had never been led to understand that, when she married the respondent, Miss McGlyn would form a permanent part of his household, her determined objection to the Ramsgate project is in F every way comprehensible. The respondent's explanation of the project was somewhat different, but his memory is so unreliable that he has possibly forgotten the details, and, in any event, his view as to the consideration due to his wife is so unusual that the suggestion put forward by the petitioner does not appear to me to be in any degree G unlikely. I am sure that the respondent would have considered his own interests and convenience alone, and would not have been deterred from making, or diverted from pursuing, any project he favoured because it happened to be objectionable to his wife. Within four days of leaving her husband—namely, on Mar. 1, 1939—the petitioner filed her suit H for nullity against her husband. If ever there was a case, therefore, in which "delay" in putting forward a plea was reduced to a minimum, it is this case.

Let us return now to a consideration of the legal aspect of the plea of "insincerity." It will be remembered that, in nearly every case where this plea has been judicially considered, delay in putting it forward

has been the basis upon which its sincerity has been attacked. The limitation upon the ordinary meaning of the word "sincerity" to which I have alluded above seems, therefore, to be fairly clearly defined. The petitioner must be sincere in the sense of not having wavered in her view as to the action she would take to assert her rights after she attained full knowledge of the facts and the law concerning those rights. A
The court will not allow a petitioner, after attaining such knowledge, to approbate the contract of marriage and obtain rights and benefits thereunder for a term of years and then subsequently reprobate the contract and claim that it is void upon the strength of those very rights which she had long elected to ignore. Upon this view of the law, the B
Scottish case of *L.* v. *L.* (2) appears to fall in direct line with the earlier decision of the House of Lords of *G.* v. *M.* (1), and the only reason why the antecedent period of which the **Earl of Selborne**, L.C., speaks was in that case antedated to include a period before the marriage was that there was there present the unusual feature of the petitioner's knowledge C
of incapacity before the celebration of the marriage. Applying the law, therefore, as I understand it, to this case, I think that the point of time at and from which the petitioner's "sincerity" is to be judged is such point of time as that at which she obtained knowledge of her husband's incapacity and a corresponding knowledge of the right in law which that D
incapacity allowed her to exercise.

The petitioner in this case was in no sense an ingenuous person. It is accordingly fair to suppose that, after a week of unavailing efforts, she came to a pretty clear conclusion that her husband was impotent. Nor do I imagine that, at the time when she came to this conclusion, E
or at least a day or two after, when she received the first of the respondent's "ultimatums," she had any longer any doubt as to her legal position. That she should have thereafter attempted for the better part of a month to make something out of her married life does not appear to me to militate in any way against the "sincerity" of her F
suit.

In order to understand this aspect of the matter, it is perhaps necessary to dwell for a moment or two upon the respective characters of the parties to the suit. I have already said enough concerning the respondent to make it clear that he is a most unruly, ungovernable, and egotistical G
individual. In spite of 40 years' practice as a solicitor, he proved a garrulous and most unsatisfactory witness. His volubility is only equalled by his volatility. He loves publicity, and luxuriates in litigation, but his abiding interests in life are his health, his money and himself. The petitioner is a woman of great self-possession and fair H
intelligence. I do not for a moment suppose that she married the respondent under the spell of any particular illusion. However, I think that he had succeeded in concealing from her the more objectionable sides of his character and the harsher aspects of his egotism. She must have known on Jan. 18, 1939, that she was throwing in her lot with an

eccentric old man, who might possibly prove both difficult and tiresome. On the other hand, she was a person whose lines had not fallen in pleasant places, and who had probably come to feel that she could not expect the best things in marriage. Calculating, however, that the second best in a hard world might be better than the kind of single life she was
A pursuing, she married the respondent, as she herself said in answer to the first question put to her in cross-examination :

> Because I was very fond of him and wanted children and a home.

She could not, of course, know that the question which provoked that answer—namely, "Why did you marry Mr. Nash ?"—was going to
B be put to her at that moment and in that way, and her reply was prompt, and apparently uncalculated. If I were called upon to appraise the exact value of her answer, I should be strongly inclined to think that the attraction of a home ought to have come first, that she was seeking security rather than indulging an especial fondness for the respondent,
C and that the idea of children was one which she was ready to tolerate rather than to desire actively. On the whole, however, having seen her for many hours in the witness-box and under a cross-examination which lacked nothing in length and in detail, I come to the conclusion that the answer which I have quoted was in the main truthful. Even
D upon the topic of children, it is clear that it is not untruthful. It is conceded that she mentioned this subject before marriage, and that no form of contraceptive was ever suggested or employed during the respondent's attempts to consummate the marriage. The fact that she was in no way unwilling to have children militated very strongly,
E to my mind, against the repeated suggestion that she was insincere because she married the respondent for pecuniary advantage. If, therefore, I had to determine whether or not, in her motives for marrying, the petitioner was guilty of "insincerity," I should not feel justified in arriving at any conclusion of insincerity against her. For the reasons
F I have given, however, I do not think that the issue of "sincerity," when properly delimited and understood, has anything to do with her motives for marriage.

To judge the matter from what I conceive to be the proper legal standpoint, the petitioner does not appear to me to be in any manner or
G degree lacking in the necessary sincerity. There has been no kind of delay in presenting her petition. She has done nothing that I can see to approbate this marriage. She has obtained none of the benefits, material or otherwise, which a woman has a right to look for in marriage, and the continued acceptance of which may properly be held to dis-
H qualify her from claiming its avoidance. Accordingly, the respondent's defence fails completely.

Decree of nullity with costs.

Solicitors : *Gordon, Dadds & Co.* (for the petitioner) ; *James Ball & Son* (for the respondent).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

Re O'KEEFE, POINGDESTRE *v.* SHERMAN.

[Chancery Division (Crossman, J.), **November 11, December 1, 5, 6, 1939.**]

Conflict of Laws—Succession to estate of intestate—Intestate's domicil of choice—Law of nationality applicable by virtue of law of domicil of choice—Different municipal systems of law of nationality.

In 1937, the intestate, who was of British nationality, died in Naples, where she had been living for 47 years. She was born in Calcutta in 1863, where her father was then residing. Her father was a native of what is now the Irish Free State. The intestate, after spending some years in India, France and England, finally went to Italy in 1890, and died there without ever acquiring Italian nationality. It was not disputed that her domicil at the time of her death was Italian, and that, according to Italian law, her estate was distributable according to the law of her nationality, which was British. There being three different municipal laws applicable according to the law of nationality, the question arose whether (*a*) English law, (*b*) the law of the Irish Free State, or (*c*) the law of British India, was the law according to which the intestate's estate was distributable :—

Held : the intestate's estate was distributable according to the law of the Irish Free State, for that country was, on the facts, the intestate's domicil of origin.

[**EDITORIAL NOTE.** Succession on intestacy is governed by the law of the domicil of the deceased, and not infrequently the law of the domicil provides that the succession is to be determined by the law of nationality. The law of nationality applying, there was here a choice between three different municipal systems of the law of the nationality, and, as between these, it is held that, in the circumstances of this case, the system of the domicil of origin prevails.

As to Law Applicable to Succession on Intestacy, see HALSBURY, Hailsham Edn., Vol. 6, pp. 245-250, paras. 299-304 ; and for Cases, see DIGEST, Vol. 11, pp. 367-369, Nos. 468-491.]

Cases referred to :

(1) *Re Ross, Ross* v. *Waterfield*, [1930] 1 Ch. 377 ; Digest Supp. ; 99 L.J.Ch. 67 ; 142 L.T. 189.

(2) *Re Askew, Marjoribanks* v. *Askew*, [1930] 2 Ch. 259 ; Digest Supp. ; 99 L.J.Ch. 466 ; 143 L.T. 616.

Adjourned Summons to determine the law applicable to the distribution of the intestate's estate. The facts are fully set out in the judgment.

L. M. Jopling for the plaintiff, a sister of the whole blood.

Hon. Denys B. Buckley for the first defendant, a sister of the whole blood.

Wilfrid M. Hunt for the second and third defendants, a brother and sister of the half-blood respectively.

Crossman, J. : This case relates to the estate of Mary Alice O'Keefe, who died a spinster and intestate in Naples in 1937. Letters of administration were granted in England on Feb. 6, 1939. The facts are not in dispute. Her father, James William O'Keefe, was born in County Clare, which is now part of the Irish Free State, in 1835. He went to

India, and about 1858 he married a lady of Irish parentage in Calcutta. The intestate was born of that marriage in Calcutta about 1860, and the plaintiff was born of the same marriage in Calcutta about 1863, so that those are two sisters of the whole blood.

I may follow now (I do not think it is seriously disputed) the affidavit of the plaintiff which sets out the facts. About 1867, the intestate and the plaintiff were brought by their parents to Boulogne, and lived there with an aunt while the parents went to England and spent the father's leave there. Later in the same year, the parents called upon the intestate and the plaintiff at Boulogne, and they all returned to India. About 1873, the parents brought the intestate and the plaintiff to Lyons in France, and placed them in a convent there for their education. In the same year, the parents returned to India with the first defendant Jane Margaret Mona Sherman, who was Jane Margaret Mona O'Keefe, and Terence O'Keefe, who were the third and fourth children of the marriage to which I have referred, leaving the intestate and the plaintiff at the convent. The mother of both the intestate and the plaintiff died in Calcutta about 1877, and about 1878 the father came to Lyons, took the intestate and the plaintiff for a short tour in Ireland, and then placed them at a convent at Roehampton in England.

In Oct., 1878, the father married his second wife in London and took her back to India. There were three children of the second marriage—namely, the second and third defendants, Francis Joseph O'Keefe and Agnes Mary O'Keefe, and another daughter, Ella O'Keefe. Terence O'Keefe, who was the third child of the first marriage, and Ella O'Keefe, the third child of the second marriage, both predeceased the intestate without leaving issue, so I am not concerned with them. About 1880, the intestate left the convent in Roehampton and joined the father and stepmother in India. About 1884, the father brought the intestate with the rest of his family to England, and, after spending the winter with them in the Isle of Wight, he took a house at Ramsgate, and, leaving the family there, returned to India and died in Calcutta in Feb., 1885. After that, the intestate lived for a short time in Spain and Tangiers, and, in 1890, for a short time in the Channel Islands. In 1890, the intestate went to Naples, and lived there until her death 47 years later in 1937. She never acquired Italian nationality, but, on the evidence which I have shortly detailed, I hold that the intestate was domiciled in Italy at the time of her death. That answers the first question raised by the summons. I do not think that there has been any serious dispute as to that. I think that both sides really accept the view that she had acquired a domicil of choice in Italy at the time of her death. I think that it is also quite clear that her domicil of origin was in Southern Ireland, which is now part of the Irish Free State.

The second question raised by the originating summons is whether the personal estate (I understand that she had personal estate only) as to which the intestate died intestate is distributable (*a*) under the law of England, (*b*) under the law of Eire, or (*c*) under the law of British India. *Prima facie*, the law applicable is the law of the intestate's domicil at the time of her death—that is to say, Italy—but, by the law of Italy, as to which I have evidence, and as to which I think there is no real dispute, by the Italian Civil Code, art. A, intestate successions are regulated by the national law of the deceased.

I hold that the intestate's nationality was British. The question then arises as to which of the systems of municipal law which are applicable to British subjects is the law applicable to a succession to the intestate's estate. Italian lawyers cannot say what is the meaning of the law of the nationality where there is more than one system of law of the nationality, but I have evidence, which I think is not disputed, from experts in Italian law that the Italian law would hold that the succession is regulated by the law of the country to which the intestate belonged, and to which she belonged, I think, at the time of her death.

The plaintiff and the first defendant, whose interests are the same, and who are sisters of the whole-blood of the intestate, by their respective counsel contend that the law applicable is the law of England. Counsel for the second and third defendants, who are a brother and sister respectively of the half-blood, contends that the law applicable is the law of Eire. *Ex hypothesi*, the intestate was not domiciled at her death in any part of the British Empire, but the case depends upon the fact that she was domiciled in Italy at the time of her death. However, I find on the evidence, as I have already said, that her domicil of origin was that part of Ireland which is now Eire. Counsel for the plaintiff and for the first defendant, respectively, say that the law of Eire cannot be the law to be applied, because, by the law of Eire, the intestate would not, in the circumstances, have been a citizen of Eire at her death, by reason of the Irish Act which states what the meaning of Irish citizenship is. Counsel for the second and third defendants admits that the intestate was not a citizen of Eire at her death. However, looking at the whole of the facts, and considering the evidence of the Italian lawyers which I have before me, as to which I think there is no real doubt, I have come to the conclusion that the only part of the British Empire to which the intestate can be said to have belonged, in the circumstances, is the part from which she originated. It is true, as counsel for the second and third defendants points out, that her domicil of origin, which is Southern Ireland, is something which remains in reserve ready to attach again whenever no other domicil arises. It is true that, at her death, her domicil was Italian, which I am bound to accept, because that is the hypothesis on which the question arose, but, if one removes the Italian domicil, the only other domicil which she could have had was that of Southern Ireland.

Finding, as I have found, that her domicil of origin was Southern Ireland, I hold that the law now applicable to the distribution of her estate is the law of Eire applicable to a person dying intestate domiciled in

Eire. I think that this conclusion is at least in accordance with the respective views of LUXMOORE, J., as he then was, and of MAUGHAM, J., as he then was, in *Re Ross, Ross* v. *Waterfield* (1), at p. 406, and *Re Askew, Marjoribanks* v. *Askew* (2), at p. 269, and, although I cannot in any way rely upon them as authorities, I am interested in finding that this conclusion seems to me to be that arrived at in CHESHIRE ON PRIVATE INTERNATIONAL LAW, 2nd Edn., pp. 161, 162, and also in DICEY'S CONFLICT OF LAWS, 5th Edn., p. 875. The result is that the second question should be answered by saying that the estate of the intestate is to be distributed among the persons entitled thereto under the law of Eire in the Irish Free State—that is to say, under the law applicable to a person domiciled in the Irish Free State.

Declaration that law applicable is law of Irish Free State.

Solicitors: *Sanderson, Lee & Co.* (for the plaintiff); *Bennett, Ferris & Bennett* (for the first defendant); *Kingsford, Dorman & Co.*, agents for *Thorn Drury & Leach-Lewis*, Ramsgate (for the second and third defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

DORMER AND OTHERS *v.* NEWCASTLE-UPON-TYNE CORPORATION.

[KING'S BENCH DIVISION (Wrottesley, J.), **December 12, 13, 15, 21, 1939.]**

Public Authorities—Statutory powers—Erection of barrier along pavement in front of plaintiffs' building—Nuisance—Invasion of private rights of property—Newcastle-upon-Tyne Improvement Act, 1865 (*c. ccl*), *ss.* 22, 65.

The defendant corporation had erected a barrier, consisting of posts and lines of rails, along the edge of the pavement in front of a block of shops and offices owned by the plaintiffs, with the object of providing that persons walking on the pavement should, when wishing to cross the street, use the pedestrian crossing at either end of the barrier. The barrier constituted a nuisance and a serious invasion of the plaintiffs' right of access to the carriageway of the street. The corporation had been empowered by a private Act to place posts, pillars, rails, etc., in the streets for, *inter alia*, the protection of passengers and traffic, but the Act contained a further section providing that "nothing in this Act shall authorise the corporation . . . to do . . . any act . . . amounting to a nuisance." It was contended on behalf of the corporation that the word "nuisance" in the section did not there have its ordinary meaning, and that the true meaning of the section was that the corporation, in exercising its powers, was not to act unreasonably:—

HELD: the effect of the section was to prevent the corporation from exercising its powers in such a way as to invade private rights of property, and the erection of the posts and rails was such an invasion.

[EDITORIAL NOTE. It has been thought necessary for the safety of the public to erect railings at the edge of the footpath to ensure that pedestrians cross the road by the pedestrian crossing. The railings necessarily restrict the access to the carriageway from business premises, and it is here held that the statutory powers of the local authority were insufficient to justify the erection of these rails, which were in law a nuisance.

As to Permissive Authority, see HALSBURY, Hailsham Edn., Vol. 26, pp. 259, 260, para. 573; and for Cases, see DIGEST, Vol. 38, pp. 21-31, Nos. 112-175.]

Cases referred to:

(1) *Camberwell Assessment Committee* v. *Ellis*, [1900] A.C. 510; 38 Digest 642, *1601*; 69 L.J.Q.B. 828; 83 L.T. 201.
(2) *London, Brighton & South Coast Ry. Co.* v. *Truman* (1885), 11 App. Cas. 45; 36 Digest 221, *626*; 55 L.J.Ch. 354; 54 L.T. 250; *revsg.*, 29 Ch.D. 89.
(3) *Goldberg & Son, Ltd.* v. *Liverpool Corpn.* (1900), 82 L.T. 362; 38 Digest 29, *161*.
(4) *East Fremantle Corpn.* v. *Annois*, [1902] A.C. 213; 38 Digest 28, *158*; 71 L.J.P.C. 39; 85 L.T. 732.
(5) *Edgington* v. *Swindon Corpn.*, [1939] 1 K.B. 86; [1938] 4 All E.R. 57; Digest Supp.; 108 L.J.K.B. 51; 159 L.T. 550.
(6) *R.* v. *Pease* (1832), 4 B. & Ad. 30; 38 Digest 46, *275*; 2 L.J.M.C. 26.
(7) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; 38 Digest 44, *256*; 50 L.J.Q.B. 353; 44 L.T. 653; *affg.* S.C. *sub nom. Hill* v. *Metropolitan Asylum District Managers*, 49 L.J.Q.B. 228.
(8) *Sutton* v. *Clarke* (1815), 6 Taunt. 29; 38 Digest 22, *122*.
(9) *Coats* v. *Clarence Ry. Co.* (1830), 1 Russ. & M. 181; 11 Digest 137, *244*; 8 L.J.O.S.Ch. 72.

Action for damages for nuisance alleged to have been suffered by the plaintiffs through the erection by the defendants of a barrier along the edge of the pavement in front of a building of which the plaintiffs are owners or in which they are otherwise interested. The plaintiffs also ask for an order for the removal of the barrier. The facts are fully set out in the judgment.

Sydney G. Turner, K.C., and *Cecil R. Havers, K.C.*, for the plaintiffs.

R. M. Montgomery, K.C., and *A. Capewell* for the defendants.

Wrottesley, J.: The plaintiffs are either owners of, or otherwise interested in, Grainger House, a recently reconstructed block of offices and shops situate in Blackett Street, Newcastle-upon-Tyne, and facing upon a busy traffic centre in that city. Just opposite to Grainger House, two other streets, one of them a very busy street, converge and join Blackett Street. On Aug. 16, 1938, the city engineer erected a temporary barrier, consisting of ropes and iron posts, along the edge of the pavement in front of Grainger House. After this had remained in position for some considerable time, it was lengthened to the eastward so as to extend, not merely along the whole front of Grainger House, but also along the front of two shops lying to the east of Grainger House. The result of this was to provide a barrier extending from a pedestrian crossing in Blackett Street for a distance of about 138 ft., and terminating at the western end of Grainger House. The object of it was to provide that, when persons walking on the pavement on the north side of Blackett Street wished to cross the street, they should either use the pedestrian crossing, or, if they passed that crossing, be prevented from crossing the road until they had reached a point beyond Grainger House where a further pedestrian crossing was provided. Corresponding restrictions would thus be placed on movement in the opposite direction. There is no evidence to show when this extension took place or by whom it was ordered, but it happened some time before Dec. 2, 1938, when the rope barrier was taken away and replaced by the present permanent barrier, consisting of posts and two lines of rails. The correspondence appears to show that this extension had taken place by Oct. 31, 1938.

The plaintiffs complain that this barrier is a nuisance and seriously invades their rights, and ask that the court shall order it to be removed and shall award them damages for the injury which has already been caused to them. There cannot be any doubt that this barrier is a nuisance, nor that it seriously invades the plaintiffs' rights of access as owners of property in a street to the carriageway of the street. Indeed, this has not been seriously contested. The defendants say, however, that, by the Newcastle-upon-Tyne Improvement Act, 1865, s. 22, Parliament authorised the corporation to erect the barrier, and that, therefore, nuisance or no nuisance, the corporation is acting within its powers. Sect. 22 provides as follows:

> The corporation may continue, or from time to time place and maintain, in any street any posts, pillars, rails, bars, chains, or other fence, permanent or temporary, for the protection of passengers and traffic, and for preserving any footway clear from annoyance, and for prevention of accidents, and may place posts in the carriageway of any street so as to make the crossing thereof less dangerous to passengers, and may place fountains in convenient parts of the footways or carriageways of streets.

There is no doubt that, if Parliament has clothed the corporation with such powers, without limitation, the persons whose rights are invaded by such exercise have no remedy. There are many cases where public bodies have been entrusted by Parliament with powers to be exercised for the benefit of the public, the exercise of which results inevitably in the invasion of persons' rights, yet Parliament has not always in these cases provided that persons so injured shall be compensated. Such powers must always be exercised reasonably—that is to say, in such a manner as to do as little damage as possible to persons affected—but, provided they are so exercised, then the damage done is one for which the courts provide no remedy.

The Newcastle-upon-Tyne Improvement Act, 1865, contains another section, sect. 65, upon which the plaintiffs rely as an answer to the defendants' claim to erect this barrier. Sect. 65 provides as follows:

> Provided always, that nothing in this Act shall authorise the corporation or any lessee of the corporation to do or be party to any act or thing amounting to a nuisance.

This section, which is in the form of a proviso, is to be found in a bundle of sections dealing with sewers and sanitary arrangements, and so described in a marginal note, whereas sect. 22 is the first of a bundle of sections dealing with streets, and so described. The Act, which is one

obtained by the corporation, deals with a great variety of matters, including various street works, and, apart from sect. 22, the corporation might find themselves involved in activities authorised under the Act which might be a nuisance. While the defendants do not in terms abandon the point, and in fact in terms reserve it, they did not urge in this court that sect. 65 is not, by reason either of its language or of A
its position in the statute, to be read as a limitation on the corporation's activities under sect. 22. Its language is, indeed, indisputable :

> . . . nothing in this Act shall authorise the corporation . . . to do . . . any act . . . amounting to a nuisance.

Thus, except by doing violence to that language, I cannot possibly hold B
that the corporation are, in the exercise of sect. 22, authorised to erect and maintain these posts and rails regardless of whether or not they are a nuisance.

The corporation, however, urge that, properly understood, this latter section does not mean that they cannot erect these posts and rails. C
Their counsel points out that which cannot be gainsaid—namely, that one cannot put any post or rail or fence in a street without committing the most elementary and well-understood form of nuisance, and, since that is so, it is said that sect. 65 cannot be read in its ordinary meaning, for, if it is so read, Parliament has elaborately enacted in sect. 22 some- D
thing which it has with equal formality gone on to forbid in sect. 65, and, since this is (to use the phrase of the EARL OF HALSBURY in *Camberwell Assessment Committee* v. *Ellis* (1), at p. 517) " disrespectful to the legislature," we are, he says, driven to the conclusion that the word " nuisance " in sect. 65 has not its ordinary meaning. Accepting this E
proposition, the corporation offers, as the true meaning of the language in sect. 65, that it really is only another way of saying, as the courts have said, time and again, that, in exercising their powers, the corporation must not act unreasonably. They must not do more damage to private interests than they need. They must not abuse their powers. F
They must act *bona fide*. Their counsel words his proposition in language rather different from that used in the cases upon which he relies, and says that the language of sect. 65 is directed to prevent the corporation from creating nuisances other than the one which they are in terms permitted to create. For instance, he says that it is there to ensure G
that the posts which they do erect are not spiked posts, and that a fountain, if constructed, is not so constructed as to be a trap. In other words, the corporation must not, in creating the nuisance they are authorised to create, create also a supplementary or ancillary nuisance.

In support of their case, the corporation rely upon the following H
authorities — namely, *London, Brighton & South Coast Ry. Co.* v. *Truman* (2), *Goldberg & Son, Ltd.* v. *Liverpool Corpn.* (3), *East Fremantle Corpn.* v. *Annois* (4) and *Edgington* v. *Swindon Corpn.* (5).

In *London, Brighton & South Coast Ry. Co.* v. *Truman* (2), a railway company who created a nuisance on land purchased by agreement under their special Act by carrying on a cattle yard in connection with their cattle-carrying business were held to be authorised to do what they did, and, in the absence of negligence, it was held that adjoining owners had no remedy. As LORD HALSBURY, L.C., said, at p. 50:

> It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law. Ever since the decision of *R.* v. *Pease* (6), in 1832, it has been established so firmly by repeated decisions that that proposition is no longer within the region of controversy . . .

Then LORD HALSBURY, L.C., went on to deal with the grounds upon which it was said that the case under discussion could be distinguished, in that the cattle yard was not within the limits of deviation shown in the Act, and was not specifically authorised to be built on the site where it was ultimately erected.

The distinction between such cases and *Metropolitan Asylum District* v. *Hill* (7) was dealt with by LORD HALSBURY, L.C., in the following passage, at p. 53:

> The Railway Acts, treated as a well-known and recognised class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then [in *Metropolitan Asylum District* v. *Hill* (7)] construing. Broadly stated, the distinction taken amounted to this, that a small-pox hospital might be built and maintained if it could be done without creating a nuisance, whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not.

It is to be noted that those Railway Acts contained no such section as sect. 65 in this Act, in terms excluding the power to create a nuisance.

Goldberg & Son, Ltd. v. *Liverpool Corpn.* (3) was the case of a pole and fuse-box erected close to the principal entrance to the plaintiffs' premises by the defendants under their Tramways Act, 1897. It was in that case pointed out by SIR NATHANIEL LINDLEY, M.R., at p. 365, that the corporation were given:

> . . . express power to do acts which but for that power would be unquestionably common law nuisances. . . .You cannot interfere with streets without committing a common law nuisance.

The court were satisfied that the defendants acted *bona fide* in erecting the pole. That being so, said SIR NATHANIEL LINDLEY, M.R., at p. 366:

> . . . the nuisance has been sanctioned by Act of Parliament, and unless they can show that the powers of the Act of Parliament have been so abused that this court ought to say to the defendant, "We will interfere and prevent you using your rights," the plaintiffs have no case. In my judgment, the plaintiffs fail to make out the essential proposition which it is necessary for them to sustain in this case, that there has been such an abuse of the powers of the defendants that this court can interfere.

Here again it is to be noted that there was not anything equivalent to sect. 65 in the Acts on which the defendants relied.

East Fremantle Corpn. v. *Annois* (4) was a case where the appellant municipality, in altering the grade of a road or street under an Act empowering them to do so, drove a cutting past the respondent's house leaving it perched on a bank 6 ft. or 8 ft. above the road. The alteration was clearly no more than was necessary for dealing properly with the road. LORD MACNAGHTEN propounded the law on this topic in this passage, at pp. 217, 218:

> The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by LORD KENYON and BULLER, J., and their view was approved by ABBOTT, C.J., and the Court of King's Bench. At the same time ABBOTT, C.J., observed that if in doing the act authorised the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of GIBBS, C.J., in *Sutton* v. *Clarke* (8), decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language TURNER, L.J., observed in a somewhat similar case that "such powers are at all times to be exercised *bona fide* and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present Master of the Rolls, then COLLINS, L.J., observed that "the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

Here again there was no section to the same effect as sect. 65 in this case.

Finally, in *Edgington* v. *Swindon Corpn.* (5), the facts were somewhat similar to those in this case—namely, a local Act empowering the local authority to erect shelters, and a shelter erected so as to interfere with the rights of frontagers. FINLAY, L.J., summed up both the authorities and his view of the case before him, at p. 92 ([1938] 4 All E.R., at p. 63):

> I, therefore, cannot resist the conclusion that the true view here is that Parliament has thought fit to authorise the defendants to do a thing which at the least might, and I would go further and say almost certainly would, interfere with the rights of the owners of private property. If that is so, it seems to me that the case is at an end. One cannot go into questions of degree. The interference may be very slight, or it may be more serious. These matters are for the consideration of the defendants subject, of course, to the very important fact that the court would intervene if they acted unreasonably—and I should think they would act unreasonably if, having a choice of equally available sites, they chose to put their shelter on a site which would do really serious damage to adjacent property.

None of these cases, therefore, had to deal with the interpretation of an Act which undoubtedly in terms authorised a common law nuisance, and then went on to say that nothing contained in the Act was to authorise the corporation to do or be a party to any act or thing amounting to a nuisance.

Counsel for the plaintiffs offers a different explanation, affording, as he says, both to sect. 22 and to sect. 65 of the Act a perfectly reasonable meaning. It is that under sect. 22 of the Act the corporation is empowered to erect fences or barriers which would undoubtedly be a public nuisance, but that, by the provision of sect. 65, the corporation are forbidden so to erect this barrier as to be a private nuisance—that is to say, so as to cause some special damage to some person over and above

that inflicted upon the community at large, or so as to injure a person's property, including any easements to which he may be entitled in respect of that property. It has been said so often that I need not quote authority for it that the burden of proving that Parliament has authorised the doing of acts which interfere with private rights rests on those who
A claim the right to do those acts, and that statutes of this kind must be construed strictly against the parties to whom the authority is given. More particularly is this the case when the statute relied upon contains no compensation provisions for those who are injured. If, therefore, the only meaning to be given to sect. 65 is that the corporation are
B not, so to speak, to pile unnecessary nuisances on to necessary nuisances, this section really enacted nothing that had not already been the law of this country long before 1865. The cases about sparks before the Railway Fires Act, 1905, are, of course, only one type of instance of the application of this principle to railway legislation, and even as far back
C as 1830, in construing a railway Act in *Coats* v. *Clarence Ry. Co.* (9), LORD LYNDHURST, L.C., held that the court ought to interfere to protect the plaintiff in these circumstances. The railway company, who had power to construct their railway across a mill-race, were proposing so to construct that particular arch or bridge as to interfere with the working of the
D mill, and it was clear from the evidence in the case that it was possible for the railway so to construct their arch as not to interfere with this mill-race. In those circumstances, LORD LYNDHURST, L.C., was of opinion that in such a case the court ought to interfere to protect the plaintiff, and he awarded an injunction by which the company were restrained
E from making over the mill-race any arch of less dimensions than those of the arch recommended by the engineer's report. It is perfectly true that in the Act authorising that railway are to be found words, with which we are all familiar, to the effect that in making their works the company should do as little damage as might be in the execution of
F the powers conferred on them, and that they should make full satisfaction for all the damages sustained by reason of the execution of such powers. We are all familiar with those words appearing in that type of Act, but that is the principle which has always governed the courts in controlling persons who are granted by Parliament the right to interfere
G with those private rights, whether or not those words are in the Act of Parliament. On the other hand, it was certainly not impossible in 1865, and it is not now impossible, to place in streets posts and barriers which are (if I may use that phrase) a technical nuisance and yet do not invade the rights of frontagers or constitute what is called an
H actionable nuisance. All of us are familiar with such barriers. For instance, there are those which prevent wheeled traffic from invading passages which are either too narrow or too steep to admit vehicles without danger to the vehicles or to the foot-passengers, or to both. Another case is that of a piece of railing set up in front of the exit from a school, and this railing, so far from damaging the value of the school

premises for the purpose for which they are used, enhances them. Technical nuisances of this kind generally improve, instead of reduce, the value of the premises fronting on the passages, which are by posts made safe from vehicular invasion. Here, then, is an interpretation which gives both scope and meaning to sect. 65, whether it be applied to sewage disposal works or to posts in streets. Without that section, I should have no doubt that this was a case where Parliament had decided in the public interest to subject individuals to having their rights of property invaded without remedy or compensation. Indeed, the case would be covered by the decision of Finlay, L.J., in *Edgington's* case (5). By that section I think that Parliament meant the power so to be exercised as not to invade private rights of property at all. In this respect, therefore, the corporation must put up with a limitation on their powers in the same manner as other important bodies, such as electricity and gas undertakers throughout the country.

That leaves only two matters for consideration. First, the plaintiffs claim that, even if the Act of 1865 did empower the corporation to erect a barrier which invaded the rights of the plaintiffs, yet this particular barrier was an unreasonable use of that power. It is true that the extension of the barrier to which I have referred above is wrapped in mystery. Inquiry has not even now disclosed who ordered this extension to be made. It is clear from the minutes of the two committees involved that neither of them authorised it. Captain Embleton, the chairman of the watch committee, was quite unable to explain who ordered this experiment to be made. He did not himself give the order. This is the more remarkable as the extension was a departure from the scheme recommended by the Ministry of Transport divisional officer, and also from the scheme recommended by the watch committee. It is clear, however, that the watch committee at a later date had before it more than once the temporary and the permanent barrier as extended, and the objections of the plaintiffs to it as an invasion of their rights. It may be that the corporation might have shown more consideration for the plaintiffs without endangering the object which they had in mind. It may be that the scheme originally propounded by the Ministry of Transport officer would have attained the object of the corporation as well as meeting, as it probably would have done, the objections of the plaintiffs. Unfortunately, the watch committee took a different and intransigent view. This experiment was never made. Instead, this action has run its course, or a part of it. All this, however, does not, in my view, constitute an unreasonable use of the powers entitling the courts to interfere. I cannot but remember what Sir Nathaniel Lindley, M.R., said in *Goldberg & Son, Ltd.* v. *Liverpool Corpn.* (3). The courts cannot, with the best will in the world, take over and administer the powers granted to the corporation by the Act of 1865. To use the language of Sir Nathaniel Lindley, M.R., at p. 366 :

> That is not my duty ; that is not my province.

On this point, I am not prepared to find that the corporation abused their powers.

Judgment for the plaintiffs for £1,500 *and costs. Order for removal of guard rails in statement of claim referred to.*

Solicitors: *Dawson & Co.* (for the plaintiffs); *Collyer-Bristow & Co.*,
A agents for *John Atkinson*, Town Clerk, Newcastle-upon-Tyne (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

B *Re* A DEBTOR (No. 13 OF 1939).

[CHANCERY DIVISION (Farwell and Morton, JJ.), **December 11, 1939.**]

Emergency Legislation—Bankruptcy—Bankruptcy notice not complied with prior to coming into force of Courts (Emergency Powers) Act, 1939—*Discretion of registrar—Courts (Emergency Powers) Act,* 1939 (c. 67),
C *s.* 1 (5).

In May, 1939, the debtor failed to comply with a bankruptcy notice served upon her. Thereupon a receiving order was made against her on Oct. 23 after she had been accorded an opportunity to show that her inability to pay was due directly or indirectly to the war. The evidence filed showed that the attempted sale of a house had failed between
D July 13 and Sept. 13. The registrar having refused a stay in favour of the debtor, the latter appealed, and contended that the registrar ought to have stayed the proceedings in accordance with the Courts (Emergency Powers) Act, 1939, s. 1 (5). The creditors contended that, irrespective of whether or not the evidence filed was sufficient to grant a stay, the Act was inapplicable, as the debtor's inability to pay arose in May—namely, at the time when the debtor failed to comply with the bankruptcy
E notice:—

HELD: the inability to pay arose at the time when the debtor failed to comply with the bankruptcy notice, and the registrar had rightly refused to grant a stay of the proceedings.

[**EDITORIAL NOTE.** The importance of the present case lies in the fact that the bankruptcy notice was served and not complied with before the passing
F of the Act, but the debtor contended that she would have been able subsequently to comply with it but for circumstances attributable to the war. It is held that the Act did not apply to these circumstances.

AS TO EMERGENCY POWERS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

G APPEAL against an order of the registrar of Yarmouth County Court refusing to grant stay of bankruptcy proceedings. The facts are fully set out in the judgment of FARWELL, J.

B. M. Cloutman for the appellant, the debtor.

L. Caplan for the respondents, the creditors.

H

FARWELL, J.: This is an appeal from a receiving order made by the registrar of the county court at Yarmouth. The receiving order was made on Oct. 23, 1939, the debtor being a married woman. The petition was presented on the ground that the debtor had failed to comply with a bankruptcy notice which was issued out of the court on Apr. 29, 1939, and served on her in England on May 30, 1939, so that there was evidence that she was unable to pay her debts by her failure to comply with the bankruptcy notice at that date. The petition came on for hearing on Sept. 4, 1939. It was adjourned to Oct. 9, and it was then adjourned again to Oct. 23, when a receiving order was made. The adjournment on the second occasion was to give the debtor the opportunity of filing evidence showing her position for the purpose of showing the court, if she could, that her inability to pay her debts was due directly or indirectly to the war. She filed evidence, which is not conspicuous by its accuracy, with regard to her position. According to her evidence, she is, and was then, the owner of an estate, Ashmans Hall, in Suffolk. In fact, she was only the owner in equity, being tenant of that property, and having an option to purchase. That option she had in fact exercised, but she had failed to complete the contract. She had in fact been sued for specific performance, but no decree against her had been made, because the plaintiff had been unable to serve the notice upon her. At the date when she swore this affidavit, the contract had never been completed, and there is no evidence to show that she ever was in a position to complete that contract. The evidence further shows that in July, 1939, through her solicitors, she was in negotiation for the sale of this property, of which she was not the owner at law, although she may have been the owner in equity, and that there was a Colonel Lind who was proposing to purchase it and who had entered into a contract and had paid a deposit. The evidence also shows that some time between July 13, 1939, and Sept. 13, 1939, difficulties arose with the petitioning creditors, and there was some delay in consequence with regard to the contract. Colonel Lind, who was the person proposing to purchase the property, had been recalled to India, and he was unable, therefore, for the time being, to complete the contract. The evidence also shows that there have been some other attempts to sell the property which have been unsuccessful, which may be due partly or wholly to the war.

In those circumstances, the registrar refused to grant a stay of proceedings under the Courts (Emergency Powers) Act, 1939, s. 1 (5), and this court is now asked to say that the discretion which was undoubtedly in him either to grant a stay or to refuse it has been wrongly exercised by his refusal to grant this stay. In my judgment, the registrar exercised his discretion perfectly properly. The petitioning creditors are registered moneylenders, and their debt is in respect of money lent. The notice was served on the debtor in May, 1939, and she failed to comply with that notice. Accordingly, she was at that date unable to pay her debts, and that inability to pay her debts was not, and could not be suggested to be, in any way the result, directly or indirectly, of any war at all, because there was then no war. The lady says that now, owing to the war, she has been unable to sell this property of which she was the owner in equity, but that, if she had not been prevented by the war from completing the purchase in Sept., 1939, or Oct., 1939, she would then have

been in a position to pay her debts. In my judgment, on those facts, there is no ground for the staying of proceedings. Under the subsection, the inability to pay the debts is an inability which arises at a time when the debtor is, as in this case, unable to comply with the bankruptcy notice. She was then unable to pay her debts, and that was in no sense due to
A the war. The fact that she has since found difficulty in realising the property which might have enabled her (although, on the evidence before us, that is by no means certain) to satisfy the judgment creditor at a later date seems to me to be an irrelevant consideration. Apart from that altogether, the onus is undoubtedly upon the debtor to prove
B that her inability to pay her debts is due to the war, directly or indirectly. In my judgment, she has failed to discharge the onus that lies upon her, and, therefore, I think that the registrar exercised his discretion rightly in this case. The appeal must be dismissed with costs.

C Morton, J.: I agree, and I only desire to add that I also view with grave disapproval the words in para. 1 of the debtor's affidavit: "of which I am owner." It seems to me that that is apt to convey an entirely wrong impression to the court. To say "I am the owner of Ashmans Hall, Beccles," in the circumstances which have been described
D by Farwell, J., seems to me to be most misleading.

Appeal dismissed with costs.

Solicitors: *Drake, Son & Parton* (for the appellant); *Philip Goodenday & Co.* (for the respondents).

E [*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

Re WIMBUSH, RICHARDS *v.* WIMBUSH AND OTHERS.

F [Chancery Division (Morton, J.), **November 22, 23, 1939.**]

Executors—Apportionment of dividends—Sale of shares pursuant to option in will—Private sale—Apportionment Act, 1870 (*c.* 35).

By a will, dated Oct. 30, 1934, the testator directed his executors, *inter alia,* to offer to his son his shares in a company in which he
G was interested, the shares not to be sold to the son above a certain price. After the testator's death, the son duly accepted the offer, and the sale was completed on Sept. 24, 1935. Subsequently, in Apr., 1936, a dividend was declared on these shares in respect of the year ending Dec. 31, 1935. On behalf of the son, it was contended that, as purchaser, he was entitled to the whole of the dividend declared in respect of 1935. On behalf of the residuary legatees, it was contended
H that, as the son did not acquire the shares until Sept. 24, 1935, the dividends in respect of 1935 were apportionable pursuant to the provisions of the Apportionment Act, 1870, and that, consequently, he was entitled to that part only of the dividend which had accrued in respect of the period commencing on Sept. 24, 1935, and ending on Dec. 31, 1935:—

Held: the son was entitled to the whole of the dividend declared in respect of 1935, and the dividend was not apportionable.

[**EDITORIAL NOTE.** The question of apportionment of dividends in the administration of settled funds was before the courts a short time ago, but the circumstances here are quite different from those then considered. A purchase of shares between strangers raises no question of apportionment, for the shares are bought either *ex* dividend or *cum* dividend, and it is here held that a purchase by a beneficiary in the exercise of an option given him by the will is in the same position.

As to Apportionment by Executors, see HALSBURY, Hailsham Edn., Vol. 14, p. 356, para. 665; and for Cases, see DIGEST, Vol. 23, p. 416, Nos. 4874-4879.]

Case referred to:

(1) *Black* v. *Homersham* (1878), 4 Ex.D. 24; 9 Digest 351, *2224*; 48 L.J.Q.B. 79; 39 L.T. 671.

Adjourned Summons to determine whether or not certain dividends were apportionable pursuant to the provisions of the Apportionment Act, 1870. The testator provided in his will that the trustees should, within one month of his death, offer to his son Reginald his ordinary shares in the company A. D. Wimbush, Ltd., at a price to be agreed between the trustees and the son, but not exceeding £1 10*s.* per share, the son to exercise the option of purchasing such shares within six months of the testator's death, and, in the event of his exercising the option, to pay the purchase price within one year of his doing so. In a codicil to his will, the testator further provided that the trustees should offer 30,000 of the shares to the son at an agreed price, but not exceeding £1 5*s.* per share, the codicil continuing as follows:

> My said son shall have three calendar months within which to exercise such option to purchase . . . and if he . . . shall exercise such option . . . the purchase money . . . shall be paid at such time as my son desires (but not later than three years of such option being exercised) in which case it shall be paid by six equal half-yearly payments . . . and upon my son paying one-sixth part of the said purchase money my trustees shall assign to him one-sixth part of the shares so purchased and until such shares shall be so assigned my trustees shall be entitled to all the dividends declared by the company upon such shares together with interest at 5 per cent. per annum from the date of any accrued dividend until the actual payment of the said purchase money.

The testator, at the time of his death, was the owner of 70,001 ordinary shares in the company. The executors sold 30,000 shares to the son on Sept. 24, 1935, at £1 5*s.* per share: 5,000 shares on Oct. 8, 1935, at £1 7*s.* 8*d.* per share: 650 shares on Apr. 16, 1938, at £1 10*s.* per share: and 750 shares on Sept. 14, 1938, also at £1 10*s.* per share. The company declared dividends as follows: for the year ending Dec. 31, 1934, 15 per cent. less tax declared on May 15, 1935: for the year ending Dec. 31, 1935, 15 per cent. and a bonus of 2½ per cent. less tax declared on Apr. 15, 1936; for the years ending Dec. 31, 1936, and Dec. 31, 1937, 15 per cent. and a bonus of 5 per cent. less tax declared on Apr. 14, 1937, and Apr. 14, 1938, respectively. The dividend for the year 1934 on the shares in question was paid to the testator, who was still alive at the date of declaration of the same, and the subsequent dividends were paid either to the trustees or to the son, whichever was the registered holder on the day when they were declared.

Raymond Jennings for the plaintiff, the executor.

Harold Christie, K.C., and *W. J. C. Tonge* for the first defendant.

C. R. R. Romer, K.C., and *Roger W. Turnbull* for the remaining defendants.

A

MORTON, J.: I have to answer the following question:

> Whether the dividends which were paid by A. D. Wimbush & Son, Ltd., on the shares mentioned in paras. 1 and 2 hereof in respect of the following respective periods, that is to say, (i) on the 30,000 shares in respect of the year from Jan. 1, 1935, to Dec. 31, 1935, (ii) on the 5,000 shares in respect of the year from Jan. 1, B 1935, to Dec. 31, 1935, (iii) on the 650 shares in respect of the year from Jan. 1, 1938, to Dec. 31, 1938, (iv) on the 750 shares in respect of the year from Jan. 1, 1938, to Dec. 31, 1938, are or were properly apportionable between the defendant Reginald Stanley Wimbush and the executors under and by virtue of the provisions of the Apportionment Act, 1870, as at the respective dates on which the said shares were transferred to the said defendant.

One further affidavit has been filed since the last hearing, and it is an C affidavit by the defendant Reginald Stanley Wimbush, to whom I shall refer hereafter as Reginald. In para. 2, he describes the circumstances under which his first purchase of 30,000 shares in A. D. Wimbush & Son, Ltd., was carried out:

> D In the case of the first purchase of 30,000 shares completed on Sept. 24, 1935, a letter was handed to me signed by the plaintiff, on behalf of the testator's executors, offering me the said holding of shares in accordance with the terms of the testator's codicil.

Then he exhibits a copy of the letter. It is dated July 8, 1935, and it says:

E

> In accordance with the first clause of the codicil to your late father's will, dated June 6, 1934, I hereby offer to you 30,000 shares in A. D. Wimbush & Son, Ltd., at £1 5*s.* per share, and I shall be glad to receive your written acceptance of this offer in accordance with cl. 2 of such codicil within the next three calendar months.

That is signed by Mr. Richards, one of the executors, "for self and F co-executors." Then the affidavit proceeds in para. 3 as follows:

> I never in fact accepted the said offer in writing, but, I verbally accepted the same and the sale was duly completed on Sept. 24, 1935, as mentioned in para. 9 of the affidavit of the plaintiff filed in support of the originating summons on Mar. 1, 1939.

G The codicil in fact provides for written acceptance, but no point is taken on this, as the sale has been actually completed. Then para. 4 of the affidavit is as follows:

> With regard to the other purchase of shares referred to in the amended originating summons no offers were made to me in writing, but in each case the holdings H were verbally offered and purchase money was paid and the shares transferred upon the dates and in the manner mentioned in paras. 10, 11 and 12 of the plaintiff's said affidavit.

That is to say, referring for the moment to the plaintiff's affidavit, 500 further shares were sold to Reginald on Oct. 8, 1935, and, in the events which happened, the price payable by Reginald is £1 7*s.* 8*d.* That is the only sale which was made at less than the maximum price specified in the codicil, which was, in the case of these shares, £1 10*s*. per share. As regards the 650 shares, they were sold and transferred on Apr. 16, 1938, at the price of £1 10*s*., which was the maximum price under the codicil, and 750 further shares were sold on Sept. 14, 1938, at the same price. Then the last paragraph of the defendant Reginald's affidavit is as follows:

> No question of the apportionment of the dividends on the said holdings of shares or on any of them was even raised by myself or my co-executors in regard to any of the said purchases and the point, so far as I am aware, was never present to any of our minds.

The result of this evidence is that there were two sales to Reginald in 1935, after the dividend for the year ending Dec. 31, 1934, had been declared, and there were two further sales of shares to Reginald in 1938, after the dividend for the year ending Dec. 31, 1937, had been declared. All of these sales were made at the maximum price fixed by the codicil, except, as I have said, the sale of 5,000 shares on Oct. 8, 1935. I am satisfied that all those four sales stand on the same footing, in the sense that there must either be an apportionment of dividends in the case of every one of these sales or there must be no apportionment in the case of any of them. Counsel did not suggest the contrary in argument.

For the sake of simplicity, I propose to take the case of the sale of 30,000 shares to Reginald on Sept. 24, 1935. Counsel for the residuary legatees argue that the Apportionment Act, 1870, applies to the dividend which was declared on Apr. 15, 1936, in respect of the financial year ending Dec. 31, 1935. They say that the only portion of this dividend which can be retained by Reginald is that portion which is attributable to the period from Sept. 24, 1935, to Dec. 31, 1935, and that the rest of that dividend must be repaid by Reginald to the vendors. I think that it is clear that Reginald acquired these shares as a purchaser, and not as a legatee. In order to arrive at a conclusion as to whether or not Reginald's purchase gave rise to any apportionment of dividend, I think that it is helpful to consider what would have been the position if Reginald had not exercised his option to purchase the first 30,000 shares, and the trustees had sold them, in exercise of the trust for sale, on Sept. 24, 1935, to A.B., a stranger. I shall assume that the sale was one by private bargain, and not governed by any Stock Exchange rules as to when a sale is or is not to be deemed to be a sale *cum* dividend. I shall also assume that, when the bargain was struck, to quote, with necessary adaptations, para. 5 of Reginald's affidavit, "No question of the apportionment of the dividends on the shares was raised by the trustees or by A.B., and this point was never present to the minds of any party to the transaction." In other words, what is the position if C. owns shares in company X and he says to A.B., between the days on which dividends are declared, "I offer you my shares in company X at the price of (let us say) £1 10*s*. per share," and A.B. replies: "I accept your

offer"? In these circumstances, is there any apportionment of dividends,
or is there not? Applying that to the case which I am now examining,
in the circumstances which I have assumed, would the trustees have
been entitled to say to A.B., when the dividend in respect of 1935 was
declared on Apr. 15, 1936: "When you receive that dividend, you
A must pay to us an apportioned part thereof in respect of the period
from Jan. 1 to Sept. 24, 1935"? In my judgment, they would not have
been so entitled. The bargain, in the circumstances which I have
described, is as follows. The trustees agree to sell, and A.B. agrees to
buy, at the price of £X, 30,000 shares in A. D. Wimbush & Son, Ltd.
B What the purchaser agrees to buy is the shares, with all the rights which
those shares confer in respect of the capital of the company and in respect
of the profit earned up to the date of the sale. This is well illustrated
by *Black* v. *Homersham* (1). The contract is one, in my view, which
precludes any claim by the trustees to any part of the dividend subse-
C quently declared in respect of the year ending Dec. 31, 1935. The
purchaser has bought the tree, and, with it, the fruits which are ripening
on the tree. I see no reason why different principles should apply to a
sale by the trustees to Reginald under the provisions of the codicil.
It is true that the trustees were not left entirely free to make the best
D possible bargain with Reginald. They were bound to offer the shares
first to him, and they could not demand more than £1 5*s*. per share.
I am still dealing, of course, with the first 30,000 shares. The sale was,
however a sale of the shares, and I can see nothing in the provisions as
to price which could deprive Reginald of rights which would ordinarily
E vest in a purchaser of the shares.

Turning to cl. 2 of the codicil, I can find nothing there which indicates
that the testator intended the dividends to be apportioned. On the
contrary, he says:

> . . . until such shares shall be so assigned my trustees shall be entitled to all the
> F dividends declared by the company upon such shares . . .

I omit for the moment the curious provision as to interest. The pro-
vision which I have just read seems to me to indicate that, after the
shares have been assigned, the trustees are not to be entitled to any
of the dividends declared upon the shares.

G I now come to this curious provision:

> . . . together with interest at 5 per cent. per annum from the date of any accrued
> dividend until the actual payment of the said purchase money.

It is a curious fact that each of the contending parties relies upon the
H phrase "accrued dividend" as supporting his argument. Let me first
examine the position, assuming that counsel for the residuary legatees
are right, and that the testator intended the Apportionment Act, 1870,
to apply. If that is so, suppose that the trustees sold on the day before
the declaration of the dividend. That is to say, suppose they sold on
Apr. 14, 1936. In these circumstances, under the Apportionment Act,

1870, when Reginald received the dividend declared on Apr. 15, 1936, he would have to account to the trustees for the whole of that dividend, since it was declared in respect of 1935. Similarly, when Reginald in 1937 received the dividend in respect of 1936, he would have to account to the trustees for an apportioned part of that dividend in respect of the period from Jan. 1, 1936, to Apr. 14, 1936. That being so, if the Apportionment Act applied to such a purchase, it would have the curious A result that Reginald is not only accounting for an apportioned part of the dividend from Jan. 1, 1936, to Apr. 14, 1936, but he is also bound to pay interest at 5 per cent. on his purchase money in respect of the same period. Counsel for the residuary legatees, realising the difficulties of that situation, concedes—and, in my view, rightly concedes B —that, if a sale were to take place between Jan. 1 in any year and the date on which the dividend was declared, the Apportionment Act, 1870, cannot apply. He says, however, that the Apportionment Act, 1870, does apply in the case of a sale which takes place between the date of the declaration of the dividend and Dec. 31 of the same year. To C my mind, that is a most capricious provision for a testator to have in mind. If he intended apportionment to apply at all, I cannot see why it should not have applied equally whether the sale took place, in the case I have taken as an illustration, on Apr. 14, 1936, or on Apr. 16, 1936. In either event, there would be a proper apportionment of the D dividend. The whole of the dividend for 1935 would belong to the trustees, and there would be an apportionment of the dividend for 1936 up to the date of sale. There seems to be no good reason for drawing this distinction, if the argument of counsel for the residuary legatees is right and the Apportionment Act, 1870, applies. E

I now proceed to assume for the moment that the argument of counsel for Reginald is correct. The position then is not entirely a happy one under this clause which I have read as to interest. The position then would be as follows. If the trustees sold on Apr. 14, 1936, the day before the dividend was declared, Reginald, according to the argument F of his counsel, would be entitled to the whole of the dividend declared on Apr. 15, 1936, in respect of 1935, and would also be entitled to the proportion of the 1936 dividend in respect of the period from Jan. 1, 1936, to Apr. 15, 1936, and the only compensation which the trustees would get would be interest at 5 per cent. in respect of the latter period. G That, as counsel for the residuary legatees has pointed out, is a somewhat inadequate compensation. However that may be, the provision which I am now discussing seems to me, if anything, in favour of the argument put forward on behalf of Reginald, but it is, as I have said, a curious provision, which does not seem to fit very well with either con- H struction, and I do not think that either side can rely upon it very strongly in support of their argument. I base my decision on the reasons which I have already stated, which seem to me sufficient to exclude any apportionment in this case. For these reasons, I propose to answer question 4 of the amended originating summons in the negative, so far as regards the 30,000 shares. The same reasoning applies, in my view, to the other three blocks of shares mentioned in this question, and that appears to dispose of all the matters which are left for my decision.

Dividends not apportionable. Costs as between solicitor and client payable out of estate.

Solicitors: *Taylor, Jelf & Co.*, agents for *Perry, Son & Richards*, Birmingham (for the plaintiff and the first defendant); *Theodore Goddard & Co.* (for the remaining defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

FORSTER *v.* LLANELLY STEEL CO. (1907), LTD.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 18, 1939.**]

Workmen's Compensation—Industrial disease—Silicosis—Crushing bricks—Breaking down furnace lining of silica bricks—Various Industries (Silicosis) Scheme, 1931, *s.* 2 (*viii*) (*a*).

The workman was engaged in breaking down the brick lining of furnaces. The bricks contained not less than 80 per cent. silica, and a certain amount of silica dust would result from the process of breaking them down. The workman contracted silicosis:—

HELD: the work in which the workman was engaged was not crushing or grinding of bricks or other articles containing not less than 80 per cent. within the meaning of the Various Industries (Silicosis) Scheme, 1931, s. 2 (viii) (*a*).

[**EDITORIAL NOTE.** A workman has to prove that he is suffering from the disease, that the disease arose out of his employment, and that the employment was one of those described in the appropriate scheme. Here the workman has failed to fulfil the third essential. This, of course, is purely a question of construction of the scheme.

AS TO SILICOSIS, see DIGEST, Vol. 34, pp. 464, 465, Nos. 3802-3811: and see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 620-632.]

APPEAL by the respondents from an order of His Honour JUDGE FRANK DAVIES given at the Llanelly County Court on Nov. 17, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

F. A. Sellers, K.C., and *H. Edmund Davies* for the appellants.

Gilbert J. Paull, K.C., and *T. Jenkin Jones* for the respondent.

SLESSER, L.J.: This is an appeal brought under the Workmen's Compensation Act, 1925, s. 47, dealing with silicosis, as applied to a workman suffering from silicosis, by the Various Industries (Silicosis) Scheme, 1931. The man in question was certified by the Silicosis Medical Board on May 11, 1939, to be suffering from silicosis, and on that date he received a certificate of total disablement on account of silicosis, certifying that that total disablement commenced on Mar. 29, 1939.

In this arbitration the workman claims, in accordance with that

certificate, that he is suffering from that notional disease, but of course it is not sufficient for him merely to show that he is suffering from that disease as so certified. He has to satisfy the county court judge that his disease arose out of his employment, and also that the process in which he was employed is one to which the Secretary of State has applied a scheme. In this case, no difficulty arises on the first of those contentions, A
because the county court judge has come to the conclusion that the work in which the respondents employed the applicant caused the disease which now disables him, and there is no appeal with regard to that finding. It is said, however, that the county court judge was wrong in coming to the further conclusion that the work on which the applicant B
was engaged was work which comes within the definition of the process, which alone will entitle him to say that the scheme and the right to compensation apply in his case.

The Various Industries (Silicosis) Scheme, 1931, applies to a number of workmen employed upon a number of processes, but this man can bring C
himself within the scheme only if he can bring himself within the provisions of sect. 2 (viii,) which provide as follows:

> in the under-mentioned trades [this trade is amongst them] . . . the processes specified and those processes only [are covered by it].

The particular trade in which this man was engaged is that of foundries D
and metal works. Subsect. (viii) (*a*) mentions the following trades:

> In works engaged in the manufacture of steel or in steel foundries; crushing or grinding of silica rock, or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica (SiO_2).

This man was engaged on work in relation to bricks or other articles E
which, it is conceded, contained not less than 80 per cent. total silica, but it is said that the process upon which he was engaged was neither the crushing nor the grinding of bricks, but was the breaking of bricks, and it is argued that subsect. (viii) (*a*) does not extend to the breaking of bricks, in which process alone this man was employed. F

I think that the proper approach to the meaning of the words used in subsect. (viii) is to look at the order as a whole, because the order is dealing with a number of processes in which silica dust may arise, and the whole scheme must be regarded as one. When one comes to look at the order as a whole, one finds that the Secretary of State has discriminated G
between breaking, crushing, grinding and various other processes such as those mentioned in subsect. (v). For example, of cl. 2, "breaking, crushing, grinding, sieving, mixing or packing of silica rock. . . ." Again, in subsect. (vii), "breaking, crushing, or grinding of flint. . . ." Again, in dealing with tin mines, under (*b*), "breaking or crushing of . . . H
ore." All these things seem to me to point to these processes being separate and distinct processes, breaking being one process, crushing being another process, and grinding being yet another process.

In this case, the county court judge has found that what this man did was satisfied by the term "crushing." I think that he was wrong in coming to that conclusion. The county court judge puts it in his judgment in this way. He looks first of all at the definition of the word "crush" which he finds in the dictionary, and he finds that it includes:

> . . . to compress with violence so as to destroy natural shape or condition; to bruise, bray, break down into small pieces; to comminate . . .

That is the definition of the word "crush" which is given in the Shorter Oxford English Dictionary. Then the county court judge, applying that test, comes to this conclusion:

> The work of the applicant exactly complies with this definition. He compressed the cemented bricks with violence so as to destroy their natural shape or condition. He broke them down into pieces so small as to constitute particles of dust. He comminated them.

In my view, as I have already indicated, it would be to over-simplify the problem merely to take the dictionary definition and to ask oneself whether what was here done satisfied some of the many denotations which are expressed in the dictionary in regard to this term. Looking at this order itself, however, I think that there is no doubt that, if this man were in fact engaged in "breaking," it would be wrong to hold that, by reason of that fact only, unless he was engaged in "crushing" also, mere "breaking" as such, because it produced dust, or even breaking things into small particles, would satisfy the definition of "crushing." I think "crushing" here means something other than "breaking." It is true that this is said to be the "crushing" or "grinding" of bricks or other articles, and it may well be—and the cross-examination of the applicant rather indicates it—that in certain factories the silica bricks are ground for gas ports, and are possibly also crushed. We have no evidence before us as to whether or not it is usual for these old bricks to be crushed or ground again, but the process which was undertaken by this man can very simply be described. The furnaces used in these works are made of silica bricks, which are made from certain silica clay, and they are lined with a silica cement. They last only a limited time, apparently—six months, as a rule. After that time, the old bricks have to be broken down. The applicant, in his evidence, said:

> We have to break or cut brick with hammer. This gives rise to dust. The lining of walls falls on floor and is kicked up and creates dust. We have to repair air port (or flue) and gas port similarly with silica bricks. We have sledge to break down. We have the help of labourers. Some of the bricks are almost new when broken down.

Once they are broken down, it is then necessary to reline the furnaces with new bricks. That is really the whole of the process.

In my opinion, the process which was here undertaken cannot properly, having regard to the distinction made in the order between "breaking" and "crushing," be said to be the "crushing" of the bricks. I think that it is a "breaking" of the bricks which is the process which this man had to apply to the old bricks in order to get them out. Of course, as regards putting in the new bricks, that also might involve a certain amount of "breaking," because they had to be shaped and figured in order to fit them into their respective places. I do not think that any part of that process can properly be said, having regard to the trade use of these words and to the careful distinctions made, to extend to "crushing."

I regret this decision, and I think that possibly this order calls for reconsideration. One thing is quite plain, however, and that is that the legislature did not intend that every person who is a workman in work, A
and involved in exposure to silica dust, has thereby a right to compensation if he is affected by that silica dust. I think that the legislature intended to limit the right to compensation to the processes mentioned in the scheme. Therefore, although it is true that this man in his work was exposed to silica dust, he was one, possibly of many, who, being B
exposed to silica dust, was nevertheless one who is outside any of these schemes, and, therefore, although it is true that he is disabled by, and certified as suffering from, silicosis, and has contracted that disease whilst working for his employer, his claim to bring himself within the scheme must unfortunately fail. Therefore, I think that this appeal C
should succeed.

MACKINNON, L.J.: With great regret, I am constrained to agree. This unfortunate man clearly suffered from disablement from silicosis by reason of his exposure to silica dust in the course of his employment. It D
is not for me to speculate about the matter, and I do not know the reason why it was not sufficient for the legislature or the Minister, acting under the Act of Parliament, to provide *simpliciter* that anybody suffering from silicosis by reason of exposure to silica dust because of the nature of his employment should not be entitled to compensation. The legisla- E
tion and the statutory orders issued under it do not adopt any such simple method. An attempt is made to specify the various processes or forms of employment in the course of which, if a man becomes afflicted with silicosis, he may be given the right to compensation, and the order very elaborately specifies a number of various employments F
or processes. As regards this particular one, which is referred to in subsect. (viii), it is:

> . . . in the undermentioned trades, the processes specified and those processes only . . .

Therefore, if this workman is entitled to recover, he must bring himself G
within one of the processes specified in subsect. (viii), and the only one under which it is possible for him to bring himself is:

> (*a*) in works engaged in the manufacture of steel or in steel foundries; crushing or grinding of silica rock or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica (SiO_2). H

I am quite clear that the work this man was engaged in doing does not reasonably come within the definition of the work of "crushing" or "grinding" bricks. It is a great temptation—and I wish that I felt myself able to succumb to the temptation as the county court judge succumbed to it—to say that, because this work of breaking down these brick walls did produce a certain amount of fragmentary pieces of brick, and even powder, one can call the process "crushing." The truth is that the nature of the man's employment or the process in which he was engaged was not the process of "crushing" or "grinding" bricks. It was the process of breaking down old walls and rebuilding new walls, in the course of which he necessarily produced a certain amount of fragmentary pieces, and even dust, and might produce a similar sort of substance to that which would be produced by a man engaged in the process of "crushing" or "grinding" bricks. At one stage, I was very much tempted to try to pretend that the work on which this man was engaged could be called "crushing" or "grinding" bricks, but I realised that I should really be straining these words beyond their reasonable meaning in saying that, and, as my duty is to construe the meaning of these words, I am, as I say, with great regret driven to the conclusion that this man does not come within the necessary qualifications to entitle him to compensation, that of being engaged in one of these processes, and in one of these processes only—namely, the process of "crushing" or "grinding" bricks. In the result, therefore, very regretfully, as I say, I agree that this appeal must be allowed.

Goddard, L.J.: I agree. I share to the full the regret expressed by Slesser and MacKinnon, L.JJ., in having to allow this appeal. For some reason, Parliament has, under this Act, dealt specially with silicosis as a ground for giving compensation to a person who has unhappily contracted that distressing disease. It has given it a section in the Act to itself, and that section, sect. 47, provides as follows:

> (1) The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes involving exposure to silica dust . . .

It would have been quite easy for Parliament, if they had intended that every person who contracts silicosis in the course of his employment by being exposed to silica dust should be entitled to compensation, to have so provided. Parliament, however, did not do that, but they limited the right to compensation to specified industries or processes, as may be defined in a scheme by the Secretary of State. When one turns to the scheme, one finds a great many processes specifically referred to There are, for instance, in sect. 2 (iv) of the scheme, such words as:

> sawing, planing, dressing, shaping, cutting or carving of silica rock.

It seems to me that they were there trying to use exhaustive expressions. Then one finds in subsect. (v) of the scheme:

> . . . breaking, crushing, grinding, sieving, mixing or packing of silica rock . . .

Those two subsections, incidentally, deal with "mining and quarrying of silica rock." Then, when one comes to "foundries and metal works," one finds a much more confined provision as to the processes—merely "crushing" or "grinding."

It is said in this case that, when one gets into a foundry where silica bricks are used, the only work which can give rise to silica dust is the breaking down of the old bricks in a furnace, or the cutting or breaking of new silica bricks to fit particular positions in the furnace. I know nothing about that. It may be, and there is certainly a trace of it in the evidence, that there is at least one other process which is carried out in a foundry and metal works, and it may be that there are various processes in foundries and metal works which are performed in regard to the disintegration of silica bricks. The county court judge, in the earlier part of his judgment, quite accurately stated the effect of the evidence given before him as to the nature of this work upon which this man was engaged :

> The applicant had first to break down the old brick layers inside the furnaces and then build up new layers. The old layers, being cemented hard, require the use of crowbars to break them down, and the new bricks would often have to be chipped to shape them properly. Both processes, especially the former, involve the creation of large quantities of silica dust.

The fact that a large quantity of silica dust is created is not the test. As I said just now, it would have been quite easy for Parliament to have provided that, where silica dust was created in an employment, and a man thereby got silicosis, he should have compensation. Parliament, however, has not done that, and I cannot myself see how it can be said by any use of ordinary language that the breaking down of a wall of bricks, or the building up of a wall of bricks, involving the cutting of a brick to fit a particular place, can be said to be " crushing " or " grinding."

I am well aware that we should always approach questions under the Workmen's Compensation Act with a tendency to give what is sometimes called a liberal interpretation to the Act—that is to say, " liberal " in favour of the workman—remembering that the Act was created to extend the remedies and right to compensation of the workmen, and not to limit them in any way. However, before I can stretch the language, and if I do stretch the language, used in this Act, and in the scheme, to fit the particular facts of this case, I should have to stretch my judicial conscience a great deal further than I am prepared to stretch it. I do not think that by any ordinary interpretation of language the process the county court judge has found to be the one in which the workman in this case was engaged can be described as either " crushing " or " grinding." It can only be described as " breaking." As " breaking " is regarded as a separate process in this order, as has been shown by reference to other paragraphs in the order, it seems to me that it is impossible to hold that the words of sect. 2 (viii) (*a*) bring this man within the ambit of the scheme, or that he is entitled to compensation. I regret, in the circumstances, that this appeal must succeed.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors : *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the appellants) ; *W. H. Thompson* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

WALLACE-JOHNSON *v.* R.

[PRIVY COUNCIL (Viscount Caldecote, L.C., Lord Thankerton, Lord Alness, Lord Romer and Sir George Rankin), **October 30, 31, December 11, 1939.**]

Privy Council—West Africa—Statutes—Construction of colonial statute—Criminal law—Seditious writing concerning government—Words themselves not likely to incite to violence—No extrinsic evidence of seditious intention—Effect of English decisions on construction—Criminal Code of Gold Coast Colony, s. 330.

The appellant published in a newspaper in the Gold Coast Colony an article attacking legislation and events in the colony. There was no evidence of any outbreak of violence or of any manifestation of hostility to the government of the Colony as a result of the article. The appellant was convicted of unlawfully publishing a seditious writing of and concerning the government of the Gold Coast, and also of unlawfully having in his possession documents containing seditious writing of and concerning that government, contrary to the Criminal Code of the Gold Coast Colony, s. 330 (2) (*b*), (*e*). The appellant appealed, on the ground that the prosecution could not succeed unless the words themselves were of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention :—

HELD : he was rightly convicted, as no extrinsic evidence of incitement to violence or of seditious intention is required under the Criminal Code of the colony.

[EDITORIAL NOTE. The enactments of the colonies are often drafted in words following the decisions of the English courts. Although this may give some clue to the intention of the legislature, the construction of such enactments is still primarily a matter of the construction of the precise words of the enactment, and, if the enactment is intended to be a complete code of the law, it must be construed free from any glosses derived from English decisions.

AS TO CONSTRUCTION OF COLONIAL LEGISLATION, see HALSBURY, Hailsham Edn., Vol. 11, pp. 182, 183, paras. 325, 326 ; and FOR CASES, see DIGEST, Vol. 17, pp. 465, 466, Nos. 317-324.]

Case referred to :

(1) *R.* v. *Burns* (1886), 2 T.L.R. 510 ; 15 Digest 633, *6736*.

APPEAL from the West African Court of Appeal dismissing the appeal of the appellant against his conviction by SIR PHILIP PETRIDES, C.J., sitting with three assessors on Oct. 7, 8, 9, 10, 12, 13, 1936, whereby the appellant was convicted of unlawfully publishing a seditious writing of and concerning the government, contrary to the Criminal Code of the Gold Coast Colony, s. 330 (2) (*b*), and of unlawfully having in his possession documents containing seditious writing of and concerning that government, contrary to the Criminal Code of the Gold Coast Colony, s. 330 (2) (*e*). He was sentenced to pay a fine of £50 on the first count, and, in default of payment within 14 days, to 3 months imprisonment. No punishment was inflicted on the second count.

D. N. Pritt, K.C., and *Norman Wiggins* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), and *Kenelm Preedy* for the Crown.

VISCOUNT CALDECOTE, L.C.: This is an appeal by special leave from a judgment of the West African Court of Appeal (Gold Coast Session) dismissing an appeal by the appellant against his conviction on Oct. 13, 1936, by the Supreme Court of the Gold Coast at the Assizes held at Victoriaborg, Accra. The appellant was tried upon an information containing two counts charging him with offences against the Criminal Code of the Gold Coast Colony, s. 330. The first count charged the appellant with unlawfully publishing a seditious writing of and concerning the government of the Gold Coast contrary to the Criminal Code, s. 330 (2) (*b*). The second count charged him with unlawfully having in his possession documents containing seditious writing of and concerning the government of the Gold Coast contrary to sect. 330 (2) (*e*). The trial took place before SIR PHILIP PETRIDES, C.J., sitting with three assessors, on Oct. 7, 8, 9, 10, 12, 13, 1936. The appellant was convicted by SIR PHILIP PETRIDES, C.J., on both counts, and was sentenced to pay a fine of £50 on the first count, and, in default of payment within 14 days, to be imprisoned for 3 months. No punishment was inflicted on the second count. The appellant appealed to the West African Court of Appeal against his conviction. The appeal was heard on Nov. 17, 18, Dec. 1, 1936, and was then dismissed. The appellant petitioned His Majesty in Council for special leave to appeal, and this was granted on July 28, 1938.

The writing which was the subject-matter of the charges was part of an article signed "Effective," and was published in a newspaper circulating in the Gold Coast Colony. The material words as set out in the information, together with allegations as to the meaning attributable to certain words and phrases, were as follow:

> Personally, I believe the European has a God in whom he believes and whom he is representing in his churches all over Africa. He believes in the god whose name is spelt Deceit. He believes in the god whose law is "Ye strong, you must weaken the weak. Ye 'civilised' Europeans, you must 'civilise' the 'barbarous' Africans with machine guns. Ye 'Christian' Europeans, you must 'Christianise' the 'pagan' Africans with bombs, poison gases, etc."
>
> In the Colonies the Europeans believe in the god that commands "Ye administrators [meaning to include therein the government of the Gold Coast] make Sedition Bill [meaning to include therein the Criminal Code Amendment Ordinance of the Gold Coast, No. 21 of 1934] to keep the African gagged. Make Forced Labour Bill [meaning to include therein the Labour Ordinance of the Gold Coast] to work the Africans as slaves. Make Deportation Ordinance [meaning to include therein the Kofi Sechere Detention and Removal Ordinance, No. 1 of 1936] to send the Africans to exile whenever they dare to question your authority.
>
> "Make an ordinance to grab his money so that he cannot stand economically. Make Levy Bill [meaning to include therein the Native Administration Ordinance of the Gold Coast Colony, No. 25 of 1936] to force him to pay taxes for the importation of unemployed Europeans to serve as stool treasurers. Send detectives to stay around the house of any African who is nationally conscious and who is agitating for national independence and if possible to round him up in a 'criminal frame-up' [meaning thereby a criminal charge in which the evidence is fabricated] so that he could be kept behind the bars [meaning thereby prison]."

The Criminal Code of the Gold Coast Colony, s. 330 (now the Criminal Code 1936 Revision, s. 326), provides as follows:

> (2) Any person who . . . (*b*) prints or publishes by any such act as is specified in Title 18 any seditious words or writing or . . . (*e*) being found in possession

> of any newspaper book or document or any part thereof or extract therefrom containing seditious words or writing does not prove to the satisfaction of the court that at the time he was found in such possession he did not know the nature of its contents . . . shall be liable (i) for a first offence under paras. (*a*), (*b*), (*c*) and (*d*) to imprisonment for 2 years or to a fine not exceeding £100 . . . (ii) for a first offence under paras. (*e*) and (*f*) to imprisonment for one year or to a fine not exceeding £50 . . .
>
> (8) "A seditious intention" is an intention (i) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, his heirs or successors or the government of the Gold Coast as by law established; or (ii) to bring about a change in the sovereignty of the Gold Coast; or (iii) to excite His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Gold Coast as by law established; or (iv) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Gold Coast; or (v) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Gold Coast; or (vi) to promote feelings of ill-will and hostility between different classes of the population of the Gold Coast. It is not a seditious intention (*a*) to show that His Majesty has been misled or mistaken in any of his measures; or (*b*) to point out errors or defects in the government or constitution of the Gold Coast as by law established or in legislation or in the administration of justice with a view to the reformation of such errors or defects; or (*c*) to persuade His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure by lawful means the alteration of any matter in the Gold Coast as by law established other than that referred to in para. (2) of this subsection; or (*d*) to point out with a view to their removal, any matters, which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Gold Coast. Provided that none of the acts or things mentioned in provisos (*a*), (*b*), (*c*) and (*d*) shall be deemed to be lawful if they are done in such a manner as to effect or be likely to effect any of the purposes (i) to (vi) which are declared in this section to be a seditious intention. "Seditious words" are words expressive of a seditious intention. "Seditious writing" includes anything intended to be read and any sign or visible representation which is expressive of a seditious intention.

At the trial, a plea of not guilty was entered. The appellant admitted the writing and publication of the article. His defence was that the article was not seditious and that it was not calculated to bring the government of the Gold Coast Colony into hatred and contempt. A great deal of evidence was called as to the application of the article to the affairs of the colony. Notwithstanding the statements of witnesses for the defence that they did not read the article as having reference to the Gold Coast Colony, it was not really in dispute that the appellant had the government of the colony in view when he wrote the article, and that it referred to legislation and events generally in the colony. There was no evidence of any outbreak of violence or of any manifestation of hostility to the government of the colony as a result of the article.

The case presented by counsel for the appellant for their Lordships' consideration was that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention. The foundation for these submissions was sought in the summing up by CAVE, J., in *R.* v. *Burns* (1), quoted at length in RUSSELL ON CRIME, 9th Edn., pp. 89-96. Reference was also made to a number of cases on the law of sedition in English and Scottish courts, which, it was said, supported the statement of the law by CAVE, J, Their Lordships throw no doubt upon the authority of these decisions.

and, if this was a case arising in this country, they would feel it their
duty to examine the decisions in order to test the submissions on behalf
of the appellant. The present case, however, arose in the Gold Coast
Colony, and the law applicable is contained in the Criminal Code of that
colony. It was contended that the intention of the code was to reproduce
the law of sedition as expounded in the cases to which their Lordships' A
attention was called. Undoubtedly, the language of the section under
which the appellant was charged lends some colour to this suggestion.
There is a close correspondence at some points between the terms of the
section in the code and the statement of the English law of sedition
in Stephen's Digest of Criminal Law, 7th Edn., arts. 123-126, B
quoted with approval by Cave, J., in his summing up in *R.* v. *Burns* (1).
The fact remains, however, that it is in the Criminal Code of the Gold
Coast Colony, and not in English or Scottish cases, that the law of sedition
for the colony is to be found. The code was no doubt designed to suit
the circumstances of the people of the colony. The elaborate structure C
of sect. 330 suggests that it was intended to contain as far as possible a
full and complete statement of the law of sedition in the colony. It
must, therefore, be construed in its application to the facts of this case
free from any glosses or interpolations derived from any expositions,
however authoritative, of the law of England or of Scotland. D

In these circumstances, their Lordships turn to the code, and they
find nothing in the section under consideration to support the appellant's
contentions. "Seditious words," in the terms of subsect. (8), "are
words expressive of a seditious intention." By an earlier definition in
the same subsection: E

> "A seditious intention" is an intention (1) to bring into hatred or contempt . . .
> the government of the Gold Coast as by law established . . .

Their Lordships find these words clear and unambiguous. Questions
will necessarily arise in every case, as in this case, as to the facts to which
it is sought to apply these definitions. Fine distinctions may have to F
be drawn between facts which justify the conclusion that the intention
of the person charged was to "bring into hatred or contempt . . . the
government of the Gold Coast," and facts which are consistent only
with the view that the intention was no more than, in the words of a
later part of subsect. (8), "to point out errors or defects in the govern- G
ment . . . of the Gold Coast." It is quite another thing to add words
which are not in the code and are not necessary to give a plain meaning
to the section. Nowhere in the section is there anything to support the
view that incitement to violence is a necessary ingredient of the crime
of sedition. Violence may well be, and no doubt often is, the result of H
wild and ill-considered words, but the code does not require proof from
the words themselves of any intention to produce such a result, and their
Lordships are unable to import into sect. 330 words which would be
necessary to support the appellant's argument.

The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist must also fail, and for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The legislature of the colony might have defined "seditious words" by reference A to an intention proved by evidence of other words or overt acts. It is sufficient to say that they have not done so. For the reasons indicated, this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

B Solicitors: *Hy. S. L. Polak & Co.* (for the appellant); *Burchells* (for the Crown).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

C

SKELT *v.* NORWICH BENEFIT BUILDING SOCIETY.

[KING'S BENCH DIVISION (Charles, J.), **December 15, 1939.**]

Emergency Legislation—Execution on judgment—Application at trial— D *Judgment for sum of money and costs—Separate application after costs taxed—Courts (Emergency Powers) Act*, 1939 (*c.* 67), *s.* 1 (1), (4)—*Courts (Emergency Powers) Rules*, 1939 (*S.R. & O.*, 1939, *No.* 995), *rr.* 9, 10.

When judgment is given for a sum of money and costs to be taxed, and the costs are so heavy that the amount at which they will subsequently be taxed cannot be estimated, leave to proceed to execution E under the Courts (Emergency Powers) Act, 1939, may be given at the close of the trial as to the sum of money, but leave to proceed as to the costs should be made the subject of a separate application after those costs have been taxed.

[**EDITORIAL NOTE.** Though this may be regarded as a practice point, it contains two important decisions on the position arising under the emergency legislation. F The first is that leave to proceed can be given separately in respect of the sum recovered by the judgment and the costs. The second is that any application as to costs is premature until the amount of the costs has been determined by taxation. Until then, no one can know the exact amount of the costs. The matter, however, is only of practical importance where the costs are heavy.

AS TO LEAVE TO ISSUE EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, G pp. 8-10, para. 13; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

APPLICATION at the close of the trial for leave under the Courts (Emergency Powers) Act, 1939, to enforce a judgment for £49 0*s.* 5*d.* and costs. The trial had been a lengthy one, and not only would the costs H be heavy but also the exact amount could not, at the time when the application was made, be estimated within several hundred pounds. The action claimed a sum due for commission, and, by amendment, claims were added for damages for wrongful dismissal and libel. The claim for commission was settled, and, at the trial, it was held that the dismissal was justified and that there was no libel. There was a counterclaim for a declaration, for damages and for £49 15*s.* 11*d.* for arrears of rent of the defendants' premises occupied by the plaintiff and charges for gas supplied. The precise details of the claim and counterclaim are of no importance on the point here reported. Judgment was given for the defendants on the claim with costs, and on the counterclaim for £105 10*s.* 4*d.* with costs. The sum of £105 10*s.* 4*d.* was reduced by money in court to the sum of £49 0*s.* 5*d.* In the result, therefore, the defendants were entitled to their costs of the claim and counterclaim and a sum of £49 0*s.* 5*d.* At the close of the trial, the defendants applied for leave to enforce the judgment.

The Courts (Emergency Powers) Act, 1939, s. 1 provides as follows:

> (1) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money . . . (4) If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

The Courts (Emergency Powers) Rules, 1939, rr. 9, 10, provide as follows:

> 9. (1) Where no judgment or order has been given or made, an application under subsect. (1) or subsect. (3) for leave to proceed may be made at the time when the judgment or order is given or made in the presence of the defendant or respondent or his solicitor or counsel or on notice given in accordance with the provisions of the next succeeding paragraph . . .
>
> 10. (1) Where a judgment or order has been given or made, an application under subsect. (1) or subsect. (3) for leave to proceed may be made by summons in the proceedings.

Robert Fortune and *Gordon Thomas* for the plaintiff.

Cecil R. Havers, K.C., and *C. E. Rochford* for the defendants.

Havers, K.C., applied for leave to enforce the judgment for £49 0*s.* 5*d.* and costs.

Fortune: The question to be considered on the application is the defendant's ability to pay. Until the costs are taxed, it is not known what those costs will be taxed at, and, if the amount is unknown, it is impossible to consider whether leave should be given. The consideration of any application to proceed to execution as to costs, until the costs have been ascertained and until it is known what is the amount which the man is being asked to pay, is, on the face of it, premature. It is sufficient that the application as to costs should be by a summons on a two-days' notice under r. 10.

Havers, K.C.: I rely upon r. 9. I am not seeking to enforce an order which has not been made. Judgment has been given for a sum of money and for certain costs. The defendant has to satisfy the court that he is unable to pay by reason of the war. The Act places the burden on him, and, until he discharges it, no question arises. The words are:

> **1. (4)** If . . . the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so . . .

CHARLES, J.: Here you have no "debt." The costs may be taxed at nothing. It has to be an ascertained debt. Costs unascertained may be anything. The proper course is to have the costs taxed, and then by summons, as one can do under r. 10 with proper notice, apply to the master under the Act and ask for an order. It is then, and not until then, that the plaintiff has anything in the nature of a definite sum which he can say he is unable to pay. I will make an order in respect of £49 0*s.* 5*d.* unless the plaintiff convinces me that the war has interfered with his ability to pay that sum.

Fortune: I cannot claim that, but I am a little doubtful as to whether or not there is any jurisdiction under the Act to enforce part of the judgment.

CHARLES, J.: I have not any doubt about that. I am not enforcing part of the judgment. I think, however, that the costs will have to be taxed, and, after they are taxed, the defendants, if they think proper, will serve a summons under r. 10 with the appropriate notice, and will ask for leave to enforce the order for costs duly made.

Solicitors: *J. Howard Smith & Skelt* (for the plaintiff); *Butt & Bowyer*, agents for *Daynes, Keefe & Durrant*, Norwich (for the defendants).

[*Reported by* A. GRIMBLE, ESQ., *Barrister-at-Law.*]

WEBB *v.* FRANK BEVIS, LTD.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.) **January 12, 15, 1940.**]

Landlord and Tenant—Fixtures—Trade fixtures—Mode of annexation—Corrugated iron shed erected upon concrete floor—Superstructure removable without material injury—Whether concrete foundation and superstructure single unit.

The appellant company was in occupation of part of land held by the respondent on lease from the War Office. The respondent had covenanted that he would, at the end of his term, at his own expense remove all buildings and erections and restore the land to its original state. The appellant company carried on business as manufacturers of breeze and cement products, and, for the purpose of housing their machinery and warehousing their plant and materials, they erected on the land a shed 135 ft. long and 50 ft. wide. It was built of corrugated iron, and was laid upon a concrete floor. The roof rested upon solid timber posts, which in turn rested on the concrete floor, but they were not embedded in it. Each post was tied to the concrete floor by wrought iron straps on the opposite sides, and was held in position by a bolt which ran horizontally through each post. The straps, which were fixed in and protruded from the concrete floor, were fastened tightly by a nut screwed on one end of the bolt. There was no other attachment to the soil. In the shed, there were three heavy pieces of machinery similarly attached to the concrete floor. Once the roof and sides of the shed had been removed (and these could be removed in panels), the posts could easily be removed by undoing the bolts, and, if need be, the upstanding straps could be cut off level with the floor. It was contended by the respondent that the superstructure of the shed must be regarded as one with the concrete floor and as constituting a single unit affixed to the soil, and, consequently A, that it was a landlord's, and not a tenant's, fixture:—

HELD: the superstructure and the concrete floor were not a single unit, and the superstructure was removable by the tenant.

[**EDITORIAL NOTE.** The attachment of buildings to a concrete base has become such a usual feature of construction in recent times, that this decision is of the highest practical importance. At the same time, it is necessary to be on one's B guard as to the precise extent of the decision. It would probably be wrong to say that in all cases a concrete foundation can be regarded as a separate unit from the superstructure, and decisions dealing with fixtures are always very much dependent upon the particular facts and circumstances of each case. It is, however, now safe to say that the foundation and the superstructure are not necessarily one unit. As to the superstructure, it must be noted that it must be removable C without losing its identity. If it can only be removed by separation into its component boards or bricks or whatever it is made of, that is said not to be removal as a fixture; but it is sufficient, apparently, that a wooden structure is removable in panels. Here, again, the question will be decided very largely upon the particular facts of each case. For these reasons, the case of *Smith* v. *City Petroleum Co., Ltd.*, p. 260, *post*, is of interest as being the application of these principles to D the case of petrol pumps and tanks, which is the form in which this problem is most commonly presented at the present time.

AS TO ANNEXATION OF FIXTURES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 97-107, paras. 107-113; and FOR CASES, see DIGEST, Vol. 31, pp. 186-196, Nos. 3210-3325.]

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Cases referred to:

(1) *Pole-Carew* v. *Western Counties & General Manure Co.*, [1920] 2 Ch. 97; 31 Digest 196, *3325*; 89 L.J.Ch. 559; 123 L.T. 12.

(2) *Spyer* v. *Phillipson*, [1931] 2 Cl. 183; Digest Supp.; 100 L.J.Ch. 245; 144 L.T. 626.

(3) *Fisher* v. *Dixon* (1845), 12 Cl. & Fin. 312; 38 Digest 663, *70*. F

(4) *Penton* v. *Robart* (1801), 2 East 88; 31 Digest 194, *3298*.

APPEAL by the defendants from an order of FARWELL, J., dated July 11, 1939, in so far as it was found that a corrugated iron shed, erected by the appellant company on land which they held from the respondent, was not a trade fixture, and, therefore, not removable by G the appellant company. There was also an appeal against the finding of the judge as to the period for which rent should be payable, but this report is confined to the former point. The facts are fully set out in the judgment of the court delivered by SCOTT, L.J.

A. J. Belsham (for *Andrew Clark* on war service) for the appellants. H
Roger W. Turnbull for the respondent.

Belsham: The shed is a removable fixture. The only question is whether or not the superstructure was removable as a tenant's fixture. If the nature of a chattel is destroyed by the removal of it, it cannot be removed. If, however, it can be re-erected in the same form elsewhere, it may be removed. [Counsel referred to *Pole-Carew* v. *Western Counties & General Manure Co.* (1), *Spyer* v. *Phillipson* (2) and *Penton* v. *Robart* (4).]

Turnbull: The judge had to decide whether the floor and the superstructure should be treated as a composite building, or whether the floor
A should be treated as one thing and the superstructure as another. That was the right way of looking at the matter, and was in accordance with *Pole-Carew* v. *Western Counties & General Manure Co.* (1). In the present case, the building could not be dealt with bit by bit. The floor and the superstructure were put in together by the same person, and
B the building must be regarded as a whole. The floor was an essential part of the building for the purposes of the tenants' trade.

Belsham was not called upon in reply.

SCOTT, L.J. [delivering the judgment of the court]: The land upon
C which the shed here in question was erected was a piece of waste ground at Hillsea, Portsmouth, on the east side of the road to London. The respondent, who had leased the land from the War Office, had covenanted in his lease that he would, at the end of the term, at his own expense remove all buildings and erections and restore the site to its original
D state and condition to the satisfaction of the Secretary of State, and deliver up possession without payment therefor. The purposes for which the land was to be used were for grazing, and for the storage of road-making materials, machinery and implements. The lessee was also allowed with the previous consent of the local military authority:

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> . . . to erect or construct buildings or erections of a temporary character only.

The lessee covenanted also not to underlet without the previous consent of the Secretary of State.

The respondent carried on business as a contractor, but did not need
F the whole site for that purpose. The appellant company carried on business as manufacturers of breeze and cement products, and bought raw materials from the respondent. Mr. Bevis, a director of the appellant company, was on friendly terms with the respondent, and the company was in fact allowed by him to occupy part of the land from May, 1935.
G On this land the appellant company erected a large shed for the purposes of housing their manufacturing machinery and of affording warehouse accommodation for plant and materials. They first levelled and consolidated the surface, and then laid on it a concrete floor 3 ins. thick for the full dimensions of the shed, 135 ft. by 50 ft. The roof and sides
H were of corrugated iron, both carried by a timber construction, but removable. The sides were capable of being taken down in panels. The weight of the roof was carried by wide timber girders, resting on solid timber posts, which in turn rested on the concrete floor, thickened to some depth to afford adequate support. To prevent lateral movement under wind pressure, each post was tied to its concrete base by

wrought iron straps on the opposite sides, and the post and straps were held together by a bolt running horizontally through the post, while the straps were fastened tightly by a nut screwed on one end of the bolt. There was no other attachment to the soil. In the shed, there were three heavy pieces of machinery, which were similarly attached to the concrete floor.

Once the roof and sides of the shed had been taken down, the posts could easily be removed by undoing the bolts, and, if need be, the upstanding straps left behind could be cut off level with the surface of the concrete floor. This shed seems to have been erected with the informal consent of the military authorities. At a later stage, the respondent obtained a written agreement authorising the use of the site for 3 years for the purpose of manufacturing concrete and breeze products, and permitting the removal during the 3 years of the "temporary storage shed," so named in the document, subject to the site being restored. It is thus plain that the respondent recognised the temporary nature of the shed, and so informed the military authorities.

In Mar., 1936, an abortive notice to quit was served by the respondent on the company, and, on Apr. 2, 1938, another notice was served, which was treated by the respondent as effective. This notice not having been complied with, on June 13, 1938, he issued his writ claiming, *inter alia*, possession of the land and an injunction restraining the appellant company from removing the shed and machinery. A motion came before Morton, J., on July 1, and, after evidence and arguments, an agreement was made that the shed and machines should be sold on account of whom it might concern and the proceeds paid into joint names. This permitted the issue as to ownership of the shed and machines to be decided without inconvenience, the money proceeds representing the things. At the trial Farwell, J., decided that the machines were tenant's fixtures and removable by the appellant company, and there is no cross-appeal on that question. He held, however, that the superstructure of the shed must be regarded as one with the concrete floor, and as constituting a single unit affixed to the soil to the same extent as the floor itself. Possibly he found an analogy in the view taken by the Court of Appeal in *Pole-Carew* v. *Western Counties & General Manure Co.* (1), but the facts there were very different. Be that as it may, he accordingly held that the appellant company had lost all right of property in the chattels out of which the superstructure had been constructed, and that it was a landlord's, and not a tenant's, fixture. It is against this decision that the main appeal is brought.

That the concrete floor was so affixed to the ground as to become part of the soil is obvious. It was completely and permanently attached to the ground, and, secondly, it could not be detached except by being broken up and ceasing to exist either as a concrete floor or as the cement and rubble out of which it had been made. Does that fact of itself prevent the superstructure from being a tenant's fixture? I do not think so. If it had been erected on concrete blocks, one under each post, the top level with the surface of the ground, and the attachment of post to block had been plainly removable at ground level, "the object and purpose" of the attachment would have been obvious—namely, to erect a mere tenant's fixture. In my opinion, it was equally so in the actual construction adopted for holding the posts in position on their concrete supports. The photographs proved below, and shown to us, demonstrate the simplicity of this method of detachment, once the upper parts and walls had been taken down.

The judge held, and I think rightly held, that the superstructure was "to a very large extent" a "temporary" building, by which I understand him to mean that the object and purpose for which the company erected it were its use for such time as they might need it. That view goes a long way, if not all the way, towards the conclusion that, regarded apart from the floor, the shed was in law removable. The very uncertainty of the company's tenure of the site ultimately of necessity determined "the purpose and object" of the erection, and, when the judge found as a fact, as he did, that "it could be taken away, no doubt piecemeal," and re-erected elsewhere, I think he consciously decided that, apart from the floor, it was a tenant's trade fixture, and removable by the tenant as such. His only ground for taking the opposite view was that he thought himself bound to regard the two as one unit, and thought that the floor compelled him to treat the whole as a landlord's fixture. In my respectful judgment, this reasoning rested on a fallacy. If the respondent had already made the concrete floor, as well he might for the purposes of his own business, and the company had then become his tenant at will and put up the self-same superstructure, what relevance would the floor have had? In my view, none. It would not have had any more relevance than would any flat, rigid and unbreakable surface already existing when some heavy superstructure is put upon it, such as a windmill of a century or two ago, or the actual machines in the present case.

I have considered many of the decided cases, but I think the principles as explained by LUXMOORE, J., in *Spyer* v. *Phillipson* (2), at pp. 192-195, and particularly in the passage at pp. 193, 194, cited and completely concurred in by ROMER, L.J., in the Court of Appeal, at pp. 209, 210, are sufficient to dispose of this appeal. To my mind, it is inconceivable that the tenant at will should go to the expense of putting up such a structure unless it was for "the purpose and object," first, of himself using it, and, secondly, of taking it away if he ceased to be tenant.

The condition of the legal quality of removability—namely, that the subject-matter should not, by the process of removal, lose its essential character or value (see *Fisher* v. *Dixon* (3))— was plainly satisfied by the judge's own finding to which I have referred, and I see nothing in the evidence to raise a doubt as to the propriety of that finding. For these reasons, I think that the appeal should be allowed on the issue as to the shed.

Solicitors: *Gordon Gardiner, Kearton & Co.*, agents for *John R. C. Miller*, Portsmouth (for the appellants); *Mills & Morley*, agents for *Bramsdon & Childs*, Portsmouth (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SOTHERDEN *v.* SOTHERDEN.

[Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), **January 17, 1940.**]

Divorce—Desertion—Ending an existing state of cohabitation—Wife in mental hospital at date of alleged desertion.

The wife was in 1931 admitted to a mental hospital and was detained until 1936. The husband visited her on two or three occasions up to the end of 1932, when he left his then abode and was not heard of thereafter. In 1938 the wife petitioned for divorce on the ground of desertion, but it was contended that, as there was no existing state of cohabitation at the time of the alleged desertion, there was in law no desertion:—

Held: the mere fact that one of the parties was incompetent at the time to set up a matrimonial home did not make desertion impossible, and the facts proved were sufficient evidence of desertion for the statutory period of three years.

[**EDITORIAL NOTE.** The departure from the doctrine of *Fitzgerald* v. *Fitzgerald* (2) that desertion must bring to an end an existing state of cohabitation was affirmed by the Court of Appeal in *Pardy* v. *Pardy*, [1939] 3 All E.R. 779; Digest Supp. In the present decision, the Court of Appeal approves the decision in *Pulford* v. *Pulford* (1), which is, in effect, only a particular aspect of that general proposition. Where a deserted party is detained as a person of unsound mind, it seems to have been suggested that desertion cannot have commenced until that person was discharged. This view is clearly rejected by the Court of Appeal, and the period of desertion is held to have run while that party was so detained.

As to Desertion, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-969; and for Cases, see DIGEST, Vol. 27, pp. 306-319, Nos. 2837-2977.]

Cases referred to:

(1) *Pulford* v. *Pulford*, [1923] P. 18; 27 Digest 307, *2846*; 92 L.J.P. 14; 128 L.T. 256.

(2) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694; 27 Digest 307, *2845*; 38 L.J.P. & M. 14; 19 L.T. 575; *subsequent proceedings* (1874), L.R. 3 P. & D. 136.

(3) *Gatehouse* v. *Gatehouse* (1867), L.R. 1 P. & D. 331; 27 Digest 318, *2965*; 36 L.J.P. & M. 121; 16 L.T. 34.

Appeal by the petitioner from a judgment given by Bucknill, J., in the Divorce Division on Oct. 9, 1939, dismissing the petition of a wife for a decree of divorce on the grounds of desertion. The petitioner was married in May, 1915. In 1931, she was admitted to a mental hospital. Later, she went to another hospital, and was finally discharged in Sept., 1936. The husband visited her two or three times, but not after Christmas, 1932. When the wife came out of hospital, she could not find her husband, and, at the date of the hearing, she had had no news of him. She filed her petition on Nov. 23, 1938. The judge, in dismissing the petition, said it was impossible to say that the husband had deserted the wife for the period of 3 years preceding the presentation of the petition. For nearly a year of the 3 years she was in a mental hospital. The only evidence about the husband was that, after the wife went to hospital, her children went to the husband's mother, and the husband stayed for a time with his mother, but went away in July, 1932, for an unknown reason. The petitioner appealed.

S. J. Wilson Price for the appellant: The mere fact that a husband and wife are physically separated does not prevent desertion from beginning during the period of physical separation: *Pulford* v. *Pulford* (1). In this case, the husband cut himself off completely from his past life, which indicated an intention to desert the wife in 1932.

Slesser, L.J.: This appeal must be allowed. It is a case where the husband and wife were married on May 24, 1915, at Southborough, and lived together for some years. Unfortunately, in Aug., 1931, the wife suffered from mental infirmity, and had to go to Parkhurst Hospital, whence she was transferred in Feb., 1932, to the mental hospital at Maidstone. She remained there until Sept., 1936, when she came out into the world again. Twice—it may have been three times—while she was at Parkhurst the husband went to see her. She says in her evidence that she does not remember seeing him after Christmas, 1932. Then Mrs. Sotherden, the mother-in-law of the petitioner, was called, and she says that about July 25, 1932, the husband went off. She adds: "We have never seen him since." On that, there having been a period from 1932 to the date of the petition in which the wife has never seen the husband or been offered any matrimonial home or maintenance, or any conjugal rights, the wife lodged a petition asking for the dissolution of her marriage on the ground that she had been deserted for the statutory period. The judge, as I read his judgment, has refused her petition solely upon the ground that, in so far as she was still in the mental hospital as late as Sept., 1936, she was unable to show that, at the date of the petition, the desertion had continued for 3 years. That can only be upon the basis that she was not deserted while she was in the mental hospital, because I think he has accepted the evidence, and the evidence is all one way—the case was undefended and undisputed—that in fact the husband has deserted her in every sense of the word ever since 1932. In my opinion, the judge was wrong, there being clear evidence of intention to desert in 1932, in coming to the conclusion that the fact that the wife was in the mental hospital during part of the 3 years' period prevents her from alleging that her husband deserted her for the statutory period.

I think on this matter that the judgment of Sir Henry Duke, P., in *Pulford* v. *Pulford* (1) was correct. That was a case where, the parties being married in 1883, in Jan., 1884, the wife was removed to a poor law asylum as a person of unsound mind. She was not finally discharged until 1902. The facts of the case are stated as follows, at p. 19:

> In 1922 the wife took out a summons against her husband . . . for neglecting to A provide her with reasonable maintenance and so causing her to live apart from him. This summons was served on him in July, and finally dealt with on Aug. 3, when no order was made. On this occasion the husband failed to recognise his wife, and the wife could not swear that he was her husband until he had walked across the court, when she recognised his gait, as he was lame. On Aug. 17, 1922, on a fresh summons charging him with desertion, but not giving any date for the commencement of the desertion, the justices found him guilty of desertion from B Aug. 3, the date of the former hearing. The husband appealed.

The matter therefore came before a Divisional Court, and Sir Henry Duke, P., says, at p. 20:

> The second objection was of a more serious character. Counsel for the husband cited *Fitzgerald* v. *Fitzgerald* (2), in which case there is a statement by Lord C Penzance so precise that it has been relied upon as laying down a principle of law, in words which the court has merely to construe textually. That statement is this: "Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists." It is a passage frequently relied on at the bar, as if it were a text, governing all cases of alleged desertion that can arise, which the court is only entitled to construe and apply. And in this case counsel for the husband asked: "How can it be said that a state of cohabitation existed in the face of its termination by the action of the public authorities, which action D remained effective until 1902, and has never been followed by the resumption of a matrimonial home?

However, Sir Henry Duke, P., goes on to say that the matter must be construed broadly, and that Lord Penzance cannot be taken as giving an exhaustive definition of the circumstances in which desertion E may be found. Sir Henry Duke, P., says, at p. 21:

> It has been almost a commonplace in this court to hold that in order to ascertain whether there has been desertion, you must look at the conduct of the parties.

Then follow these important words, at p. 21:

> There may be no matrimonial home, and yet no forfeiture of the rights of the F spouses. Desertion is not the withdrawal from a place, but from a state of things. The husband may live in a place and make it impossible for his wife to live there, though it is she and not he that actually withdraws; and that state of things may be desertion of the wife.

Applying that test, which seems to be a correct one, I think it would be right to say here that, on the undisputed evidence, the husband G withdrew from the state of things in which the wife had a right to expect her conjugal rights, subject to the fact that for a time she was in this mental home, and that the withdrawal of the husband from the wife of her conjugal rights took place in 1932, when he deserted her. The mere fact that at a later period it was not possible to have a matri- H monial home, or for conjugal rights to be accorded, does not seem to me to be a reason for saying that desertion which in fact took place in 1932 was not effectively operative for 3 years before the time when this petition was brought. One can think of the class of case where, for the purposes of employment, a husband may be away altogether from his wife, and living in a different part of the world. I see no reason why, in such circumstances, albeit he is parted from his wife, he should not do such things in that other part of the world as would unequivocally amount to desertion of the wife. As GODDARD, L.J., has said, whether the wife here were in a hospital on account of physical or on account A of mental infirmity can make no difference. In my view, *Pulford* v. *Pulford* (1), of which I myself approve, rightly considered, is authority for saying that one must look in an appropriate case at the actual facts of desertion, without being excluded from coming to the conclusion that there has been desertion merely because one of the parties is, or B both parties are, incompetent at the time to set up a matrimonial home. In fairness to the judge, it must be stated that *Pulford* v. *Pulford* (1) was not cited in the court below. Here there has been desertion, and I think that this wife is entitled to succeed on this appeal.

C MACKINNON, L.J.: I agree.

GODDARD, L.J.: I agree. The case seems to me to be one of importance, especially having regard to the way in which BUCKNILL, J., looked at it. I need hardly say that I differ from a judge for whose opinions I have the most unfeigned respect only with great hesitation, D but I am bound to say that I think he has taken a wrong view here.

The facts show that, as far back as 1932, when the petitioner had been for some little time in the asylum, the respondent was living with his children at his mother-in-law's house. At some time about July 25, 1932, he went away and came back in the morning, telling the mother-in-E law that he had gone to see his wife. He said that he had had a telephone call to see his wife. Then he went off, and from that date they have never seen him. He simply disappeared.

The judge has said that, as the petitioner was in the mental home in 1932, and down to within 2 years of the presentation of the petition, F there cannot have been desertion for 3 years, the statutory period which it is necessary to establish. He regarded the case as one in which the man had perhaps deserted his home and children, but had not deserted his wife. I respectfully differ. Clearly the intention of the man was, in July, 1932, to have no more to do with his wife, to desert her, and G to go away. While the wife was in the hospital, whether a mental hospital or a hospital for physical diseases, he owed a duty to his wife. A man does not get rid of his obligations as a husband because his wife is in the hospital. If, while she is in the hospital, he disappears, and if, when she comes out of the hospital, he is still absent and does H not come back, I think that the only reasonable inference to draw is that he intended to desert her at the time when he went away from her. Not only may *Pulford* v. *Pulford* (1), which is very helpful on this occasion, be cited, but also *Gatehouse* v. *Gatehouse* (3), to which SIR HENRY DUKE, P., referred in giving his decision in *Pulford* v. *Pulford* (1).

I will take this sort of case as an illustration of a case where I think there would be clear desertion. A man who is living in England with his wife goes, with the consent of the wife, to Australia on a matter of business, which it is contemplated will last a year, so that he will not be returning to England for a year. However, after he has been there, we will say, 3 months, he writes to his wife and says: "I tell you I am never coming back to you. I intend to desert you, and to have no more to do with you from now." It seems to me that then, if he comes back to England at the time he is expected—namely, the end of the year—and does not resume cohabitation with his wife, it cannot be said that the desertion only started from the date when he came back. The desertion started from the date when he expressed his intention to renounce his obligations as husband to his wife. Intention is one of the most important matters to be taken into account when one is considering desertion. There are many cases in which there could be withdrawal from cohabitation in the popular sense, but where there would be no desertion, because there is no intention to desert. However, where one finds, as I think one clearly does in this case, a plain intention on the part of the husband to desert the wife in 1932, to renounce his obligations as a husband, and to have no more to do with the wife, it seems to me that the only inference we can draw here is that from July 25, 1932, the husband deserted his wife. For these reasons, I agree that the wife is entitled to a decree.

Decree nisi granted with such costs as are allowed in a poor person's case.

Solicitors: *Montagu's and Cox & Cardale*, agents for *Snell & Co.*, Tunbridge Wells (for the appellant).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

MACKENZIE *v.* MACKENZIE.

[Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), **January 17, 1940.**]

Divorce—Desertion—Non-cohabitation clause in magistrate's order—No evidence that order regarded as ineffective—Impossibility of desertion.

In an undefended petition for divorce on the ground of desertion, it appeared that in 1934 the petitioner had obtained from magistrates a maintenance order, which was in a printed form and included the words "that the complainant be no longer bound to cohabit with her husband." There was no evidence whether or not the husband had regarded this order as effective, but he had not made the payments due under it. The Court of Appeal were prepared to assume, although there was no evidence on the point, that these words were left in the order by inadvertence:—

Held: so long as the order remained unamended, no decree based on desertion could be granted.

[EDITORIAL NOTE. Here the Court of Appeal have reaffirmed the decision in *Harriman* v. *Harriman* (1), although it appears that there may have been some departure from the rule. There can, therefore, be no desertion so long as there is an order of the court containing a non-cohabitation clause.

As to Non-Cohabitation Clause in Magistrate's Order, see HALSBURY, Hailsham Edn., Vol. 10, p. 659, para. 969; and for Cases, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to:

(1) *Harriman* v. *Harriman*, [1909] P. 123; 27 Digest 321, *2995*; 78 L.J.P. 62; 100 L.T. 557.

(2) *Cooper* v. *Cooper*, [1939] W.N. 402; 56 T.L.R. 118; Digest Supp.

(3) *Hatton* v. *Harris*, [1892] A.C. 547; 7 Digest 214, *562*; 62 L.J.P.C. 24; 67 L.T. 722.

Appeal by the petitioner from a judgment of Croom-Johnson, J., at the Exeter Assizes, dated Nov. 3, 1939, dismissing an undefended petition for a decree of divorce on the ground of desertion. The petitioner was married in 1928. In her petition she said that her husband deserted her on Oct. 1, 1933, On Jan. 12, 1934, she asked the magistrates of the petty sessional division of Paignton for a maintenance order against her husband. The magistrates made an order, but the clerk, without the knowledge of the petitioner, omitted to strike out of the printed form the condition "that the complainant be no longer bound to cohabit with her husband the defendant." The judge said at the hearing of the petition that he was bound by the judgment in *Harriman* v. *Harriman* (1) to hold that the wife could not allege desertion. He would have liked to give relief, but he could not treat the order as ineffective. He therefore dismissed the petition. The petitioner appealed.

J. Scott Henderson for the appellant: This case is distinguishable from *Cooper* v. *Cooper* (2), but, even if it is not, Sir Boyd Merriman, P., was right. Where a mistake has been made in an order of a court of summary jurisdiction, the judge is entitled to disregard the part of the order which is affected by the error: *Hatton* v. *Harris* (3). In that case, Lord Watson said that, where such an error has been committed, it is within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The judge here had evidence of the form of the order which the magistrates meant to make, and evidence that they did not intend that this printed clause should be left in.

Slesser, L.J.: The petitioner, Freda Evelyn Mackenzie, was married to Angus Mackenzie, the respondent, on May 2, 1928. The petition alleges that they lived and cohabited together at various places, and then at 29, King Street, Tavistock. There is living issue of the marriage one child, Alastair Donald Mackenzie, born on Nov. 17, 1928. The petitioner alleges that the respondent has deserted her for a period of 3 years and upwards immediately preceding the presentation of this petition.

On the matter coming before the judge, the case being undefended, there was put before him, among other matters, an order which had been made by the magistrates on Jan. 12, 1934. By that order it is recited that the petitioner in this case complained that her husband had, since Oct. 1, 1933, at Paignton been guilty of wilfully neglecting to provide reasonable maintenance for her and for the infant child whom he was legally bound to maintain. The magistrates by their order ordered that this husband should pay his wife a certain sum by way of maintenance. Unfortunately, however, the order was in the usual printed form and the magistrates' clerk appears to have omitted to strike out the words, which are appropriate in cases of cruelty, but were not sought in this case as relief, as clearly appears, I think, from the notes of the evidence which was given:

> That the complainant be no longer bound to cohabit with her husband the defendant.

That was an integral part of the order. It appears from the notes of evidence taken on Jan. 12, 1934, that the order should have been, "Wife 10*s*., child 10*s*., and wife's custody of child," with no reference at all made to the question of cohabitation, which of course really did not arise on the wife's application, which was one exclusively for maintenance. However, that order was duly served by a police constable on Apr. 17, 1934, upon the defendant, and no attempt—or no successful attempt, at any rate—has been made at any time since to vary that order. Therefore, the matter now stands thus. When the petitioner came before CROOM-JOHNSON, J., there was the order of Jan. 12, 1934, on the file, that she was no longer bound to cohabit with her husband, the defendant. On that, *Harriman* v. *Harriman* (1) is conclusive against her raising the matter which is necessary under the Act on which she relies to show that there has been desertion. The effect of this non-cohabitation clause in the magistrates' order is to prevent a continuance of desertion after the date of that order, and, therefore, it was not competent for her on her petition to allege that she had been deserted by her husband for 3 years, because, after Jan. 12, 1934, she could not allege that there was a continuance of desertion.

Counsel for the petitioner agrees, as I understand him, that *Harriman* v. *Harriman* (1) would have been fatal to his appeal but for the decision of SIR BOYD MERRIMAN, P., in *Cooper* v. *Cooper* (2). In that case, the wife had obtained from a court of summary jurisdiction:

> . . . an order for maintenance on the ground that her husband had deserted her, but by inadvertence the non-cohabitation clause was not struck out.

In that case, the clause was not in a form which made it very sensible, because it stated that:

> ". . . the applicant be no longer bound to co-habit with her husband his wife."

Thus, SIR BOYD MERRIMAN, P., treated the case, as I read the judgment, upon the basis that it was appropriate in that case, and also as it stands here, that the petitioner was no longer bound to cohabit with her husband.

In that sense *Cooper* v. *Cooper* (2) was a case precisely like the present one. There, as here, those words were left in. SIR BOYD MERRIMAN, P., said, at p. 118:

> that the petitioner's case was that the non-cohabitation clause was never intended to be in the order. The petitioner did not want protection, and was not asking for protection. From first to last neither the husband nor the wife was treating the clause as effective in any way. Unfortunately, it was found to be in the order in its present form, that was to say, not to have been erased, and, as counsel had pointed out, the clause did not make sense.

Eliminating that question of its not making sense, SIR BOYD MERRIMAN, P., at p. 118, went on to say that he thought:

> that it would be pedantic to treat it as an effective non-cohabitation clause.

I think that that is on the basis that it might make sense, but, whether or not that is so, I am of opinion that, if SIR BOYD MERRIMAN, P., treated it as being a non-cohabitation clause which did make sense, and which was to be read that the petitioner be no longer bound to cohabit with her husband, he was wrong in the conclusion to which he came. I think that his conclusion is inconsistent with the decision in this court in *Harriman* v. *Harriman* (1), to which I have just referred. The order is an effective order, and we have to treat it as an order duly served on the husband which regulated the relations between the parties, and which has never since been varied. In those circumstances, it would be wrong to treat that order as a nullity, merely because it has not been treated by the parties as effective in any way. As a matter of fact, we do not know in what way the husband may have regarded this order. It was served upon him. True it is that he has disobeyed that part which deals with maintenance, but whether or not he regards himself as still bound to cohabit with his wife we have no information. The result, therefore, is that, this order so existing at all material times, the petitioner cannot satisfy the requirements of the statute as to the period of desertion, and, therefore, this appeal must be dismissed.

MACKINNON, L.J.: I agree, also with regret. I observe that on Jan. 12, 1934, there were no fewer than 9 magistrates sitting at this petty sessional division, assisted, no doubt, by a clerk. I do not know whether they have become aware of the fact that, owing to their stupid carelessness in putting this clause into a formal order of the court, they have occasioned the gravest injustice to this unfortunate woman. Unhappily, it is an injustice that we cannot remedy, and I therefore agree that this appeal must be dismissed.

GODDARD, L.J.: I agree. One difficulty I have with regard to *Cooper* v. *Cooper* (2) is that there is nothing in the report to show on what SIR BOYD MERRIMAN, P., was basing himself when he said, at p. 118:

> From first to last neither the husband nor the wife was treating the clause as effective in any way.

It may be that there was some evidence before him to that effect, but there is nothing in the report to suggest that there was. Even if there had been, I do not know how, so long as the order stands, it can be disregarded by the court, in view of the decision in *Harriman* v. *Harriman* (1). If husband and wife did agree in some way to treat the clause as ineffective, it was a very good reason for going back to the magistrates and asking them to correct the error. However, so long as the order stood, this being an order which the magistrates had power to make, and did make, I do not see how it can be disregarded by this court, so long as it stands unamended. I agree, and I do not think that the decision of Sir Boyd Merriman, P., in *Cooper* v. *Cooper* (2) can be upheld.

I should like to associate myself with every word which MacKinnon, L.J., has just said about what happened at the court of summary jurisdiction. Of course it may be—we do not know, but it is in the highest degree unlikely—that this woman, who probably was not even represented by a solicitor, asked the magistrates to put the non-cohabitation clause in the order. If she did, then, of course, she is the author of her own misfortune. Even then, however, she ought to have been warned of the danger of it. I hope that in one way or another this case will be brought to the attention of the magistrates of the Paignton division of the county of Devon, and more especially to the notice of their clerk, so that in future they may not disregard the plain warning which was given in *Harriman* v. *Harriman* (1) by this court that those words in this printed form ought to be struck out in cases where the only complaint is one of failure to maintain.

Appeal dismissed.

Solicitors: *Walter Crimp & Co.*, agents for *Kitsons, Hutchings, Easterbrook & Co.*, Torquay (for the appellant).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

SMITH *v.* CITY PETROLEUM CO., LTD.

[Manchester Michaelmas Assizes (Stable, J.), **December 20, 21, 1939.**]

Landlord and Tenant—Fixtures—Trade fixtures—Mode of annexation—Petrol pumps and tanks—Whether pumps and tanks single unit—Removal within reasonable time—On failure to remove, property in fixtures vests in landlord.

Petrol pumps affixed to tanks embedded in the ground are tenant's fixtures, and are removable within a reasonable time after the determination of the term. If not so removed, the property in the pumps passes to the landlord, and a subsequent tenant takes no interest in them.

[EDITORIAL NOTE. The subject of the decision here has long been a matter of discussion. The principles affecting it are also the subject of the decision of the Court of Appeal in *Webb* v. *Frank Bevis, Ltd.*, p. **247**, *ante*, and, as the two decisions reach the same conclusion in law, the matter may be taken to be now settled.

AS TO ANNEXATION OF FIXTURES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 97-107, paras. 107-113; and FOR CASES, see DIGEST, Vol. 31, pp. 186-196, Nos. 3210-3325.]

Cases referred to:

(1) *Davis* v. *Jones* (1818), 2 B. & Ald. 165; 31 Digest 212, *3514*.

A (2) *Saint* v. *Pilley* (1875), L.R. 10 Exch. 137; 31 Digest 204, *3453*; 44 L.J.Ex. 33; 33 L.T. 93.

ACTION in detinue claiming the delivery of certain petrol pumps the property of the defendants, the tenants of the plaintiff. The landlord, Smith, let property under a tenancy agreement to a tenant, Ridge, B who placed upon the premises petrol pumps and tanks of the type usually used by roadside filling-stations. Ridge's tenancy came to an end in Oct., 1937, when the defendants became the tenants, but nothing was said or done about the pumps and tanks, which were used by the defendants for the purposes of their business. It was admitted that the C tanks were fixtures and passed to the landlord, but it was contended that the pumps were tenant's fixtures and were the property of Ridge, and that, upon the determination of his interest in the premises, he had the right to remove them within a reasonable time. It was further contended that, as he had not done so, the pumps became the property D of the landlord, and that the defendants had no interest in them.

G. J. Lynskey, K.C., and *Harold Rhodes* for the plaintiff.

William Gorman, K.C., and *B. Ormerod* for the defendants.

STABLE, J.: The first question that arises is whether these pumps E were tenant's or landlord's fixtures. It seems to me that they are very near the line indeed. It is conceded that the tanks are really an integral part of the pumps, because a petrol pump without a tank of petrol underneath it is of very little use even in these days. However, whatever the nature of the tanks, for this matter, I think that the actual F pumping apparatus can be regarded as a separate entity.

Having heard all the evidence, I have come to the conclusion that counsel for the defendants is right when he says that these were tenant's fixtures, and not landlord's fixtures. The pumps were affixed to the freehold by four bolts which were embedded in concrete, but, of the four G bolts, only one was clamped down with a nut, and the pumps were further joined up to the tanks as part of the freehold by a kind of conduit pipe leading from the tank to the pump.

Upon the authorities, I think these trade fixtures were not part of the land, but were capable of being severed from the land without injury H to the land, and satisfied the conditions which placed them on the tenant's-fixture side of a line which is not by any means easy to draw. On that basis, I think that the position is this. Ridge could have removed the pumps in Oct, 1937, and, if he had done so, Smith would have had no cause of complaint. Ridge had no right to pass on to a fresh tenant any right to the pumps other than the right which he had himself, and the only right vested in him was a right to remove them during the period of his tenancy or within a reasonable time thereafter. For example, if the landlords had terminated the weekly tenancy and it had been impossible for Ridge to have removed the pumps within a week, I think that the law would have permitted him a reasonable time after the weekly tenancy had expired to remove them.

The defendant company went into occupation. They were in occupation for some months, and there was not the slightest attempt to remove the pumps. It was never contemplated that the pumps would be removed until Feb., 1939. It is quite plain that a reasonable time after the expiration of Ridge's tenancy in which to remove these fixtures had long expired before Feb., 1939. In that month, the agreement between the defendant company and Smith came to an end, and the defendant company were under an obligation to hand over to Smith his property, and, as part of his property, there were these pumps, which, not having been removed by Ridge during his tenancy agreement, had passed to the landlord. Accordingly, when the defendant company removed the pumps, they were inflicting a wrong on Smith.

Whether the proper form of action was detinue or conversion or waste is a question which, in 1939, is academic, although perhaps it would have presented a more formidable problem in 1818, when *Davis* v. *Jones* (1) was decided.

In deference to the very cogent argument of counsel for the defendants, I think that I must say a word about the authorities. *Davis* v. *Jones* (1) is quite clearly distinguishable here, because there the outgoing tenants on the expiration of the term gave up possession of the premises to the landlord, but it was without prejudice to their right to remove the jibs as tenant's fixtures. As between them and the landlord, it was expressly agreed that they might go on the premises to remove the jibs, although the term had expired. The landlord, who never challenged this right, quite properly demised the land to a fresh tenant, and, when the plaintiffs, in exercise of their rights which they had expressly reserved, presented themselves for the purpose of removing their property, they were met by the incoming tenants, who claimed that the property was theirs. That claim was obviously ill-founded. The incoming tenant could derive title from the landlord only by express agreement between the landlord and the plaintiffs, and the plaintiffs, apart from such agreement, retained the property in these things and had the right to remove them. *Davis* v. *Jones* (1), which was decided on the basis that the jibs were personal chattels, established the plaintiffs' right to remove their personal property as against a person who had got possession of it and claimed to retain possession of it.

A case nearer this case is *Saint* v. *Pilley* (2), in which the tenant, or his trustee in liquidation or bankruptcy, someone who was in a position to exercise the rights of tenant during the existence of the term, sold the tenant's fixtures to a third party. Thereafter, the third party, who had bought the fixtures, commenced negotiations for a fresh tenancy in his favour, and, because that matter was in negotiation, he did not at once exercise his right of removal of the things. While these negotiations were going on, the trustee informally surrendered the term to the landlord, and, when the landlord got his property back, he let to a new tenant. It was held that the purchaser of the fixtures was nevertheless entitled to get what he had bought from the new tenant. It is plain, when one looks at the judgment, that it depends on the very special facts of the case, and also on the position which arises where there is a voluntary surrender of a term before the term expires.

The court held [p. 139] that the effect of this surrender was stated in the maxim laid down in Co. Litt. 338 **b**:

> "Having regard to the parties to the surrender, the estate is absolutely drowned . . . But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance."

It was just sufficiently alive to preserve the rights of the purchaser who was not a party or privy to the purely voluntary surrender. It was said that the trustee, having sold part of the property, could not derogate from his own grant by surrendering the whole thing to somebody else. I do not think that he could.

The facts and the law which govern the decision in that case do not, in my judgment, apply at all where all that happens is that a tenancy agreement comes to an end and the tenant, instead of exercising his right to remove the fixtures, purports, without privity or knowledge of the landlord, to sell to the incoming tenant something which was not his to sell. The result is that there must be judgment for the plaintiff for the agreed amount of damages—namely, £95—and costs.

Judgment for the plaintiff for £95 and costs.

Solicitors: *Lambert & Parker* (for the plaintiff); *John Taylor & Co.* (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re ZAKON, TRUSTEE IN BANKRUPTCY *v.* BUSHELL.

[CHANCERY DIVISION (Farwell, J.), **January 15, 1940.**]

Bankruptcy—Deed of arrangement—Position of trustee—Deed ineffective for lack of assent by creditors—Subsequent bankruptcy—Expenditure in carrying on business—Remuneration—Deeds of Arrangement Act, 1914 (*c.* 47), *ss.* 2, 3, 21.

In November, 1938, the bankrupt executed a deed of arrangement which remained ineffective owing to a refusal on the part of the creditors to assent to it. On Jan. 5, 1939, a receiving order was made against him, and the applicant was appointed trustee in bankruptcy. The respondent, the trustee under the deed of arrangement, had expended certain sums of money for the purpose of carrying on the bankrupt's business, and he claimed to be entitled to remuneration in respect thereof. He therefore retained a sum of money equivalent to the amount so expended. The applicant contended that, as the deed had never become effective, he, the applicant, was entitled to the money retained by the respondent. Against that, the respondent contended that, as the moneys expended by him had benefited the creditors generally, he was entitled to retain a sum equivalent to the moneys so expended, but the court took the view on the facts that there was no evidence that the general body of the creditors had benefited:—

Held: the trustee in bankruptcy was entitled to the payment over of the money. The respondent was not entitled to retain it, as he had taken the risk of the deed of arrangement not being assented to by the creditors.

[**EDITORIAL NOTE.** The position of a trustee of a deed of arrangement is a precarious one since, for the first three months from the execution of the deed, it is always liable to be superseded by bankruptcy. In the present case, however, the deed never became effective by reason of the failure of the creditors to assent to it. The court, however, expresses an opinion that, even in such a case, the trustee might be entitled to remuneration if he could show that his labours have resulted in a real benefit to the creditors.

As to Position of Trustee, see HALSBURY, Hailsham Edn., Vol. 2, p. 439, para. 598; and for Cases, see DIGEST, Vol. 5, pp. 1108-1110, Nos. 9031-9048.]

Motion for payment over of certain sums of money retained by the trustee under an ineffective deed of arrangement. The facts are fully stated in the judgment.

Leonard Lewis for the applicant.

Alan S. Orr (for *John Buckley*, on war service) for the respondent.

Farwell, J.: This is a motion by the trustee in bankruptcy of one Marks Zakon against a gentleman who acted for a time as trustee under a deed of arrangement which turned out to be ineffective. The facts are quite short, and they are these. On Nov. 12, 1938, the bankrupt executed an assignment of his property to the respondent, as trustee, for the benefit of his creditors. On Nov. 17, 1938, the respondent procured the deed to be registered. That was an act done by the respondent on his own motion. There was not any obligation upon him to register the deed himself, but he took upon himself to get it registered, and, in doing so, he incurred some expense. On Nov. 18, 1938, a meeting of creditors was held. There was not at that meeting a majority in favour of the deed. There was still time after that when a meeting could have been held, if it had been possible, at which the majority of the creditors could have assented to the deed, but in fact there was never any such meeting at all. The only meeting which was in fact held was the one on Nov. 18, 1938, at which the majority of creditors dissented from the deed.

On Nov. 24, 1938, a creditor presented a bankruptcy petition against the debtor. A receiving order was made on Jan. 5, 1939, and, on Feb. 1, the bankrupt was adjudicated bankrupt. On Jan. 25, the applicant was appointed trustee of the debtor's property. The trustee under the deed acted for a period of some weeks, largely in getting in the book debts, but also in carrying on the business to a small extent by making up some of the material which was in the possession of the bankrupt and selling it, and it is said that the result of his efforts has been that the stock in trade was sold at a price which might not otherwise have been obtained. The respondent also seems to have incurred some expenses in connection with the collection of the debts and looking after the business. He also appears to have paid £10 as an allowance to the debtor. In those circumstances, when the trustee, the respondent, was called upon by the trustee in bankruptcy to pay over to him the moneys which the respondent had collected from the bankrupt's debtors, he paid over a sum which represented the full sum due less a sum of £121 5*s*. 10*d*., which the respondent claimed was the amount by which he was out-of-pocket in carrying on the business, as he had done in collecting the debts, and he claimed that, in those circumstances, he was justified in retaining those sums for his own benefit. The trustee in bankruptcy did not take the view that, in the circumstances of the case, any sum should have been retained by the respondent at all, and, accordingly, he moved this court for an order upon the respondent to pay to the applicant the sum of £121 5*s*. 10*d*., being the total amount which the respondent retained.

The question is one which has been argued before me as a matter of construction of the Deeds of Arrangement Act, 1914. It is only necessary for me to refer quite shortly to three sections of that Act. Sect. 2 provides as follows:

> A deed of arrangement shall be void unless it is registered with the registrar of bills of sale under this Act within 7 clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England, then within 7 clear days after the time at which it would, in the ordinary course of post, arrive in England . . .

In passing, I may say that, in my view, in the words "after the first execution thereof by the debtor or any creditor," the words "by the debtor or any creditor" refer to the execution of the deed, and not to its registration, and there is nothing in that section, so far as I can see, which imposes upon the trustee or upon a debtor or upon a creditor the duty of registering the deed. If it is not registered in accordance with the Act and within the time limited by the Act, however, the deed becomes ineffective, so that it is to the benefit of someone to see that the deed is registered. I cannot read sect. 2 as it is suggested I might read it—namely, as though the registration had to be done by a debtor or a creditor. In my opinion, that is not the true construction of that section. Sect. 3 provides as follows:

> (1) A deed of arrangement, which either is expressed to be or is in fact for the benefit of a debtor's creditors generally, shall be void unless, before or within 21 days after the registration thereof, or within such extended time as the High Court or the court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed may allow, it has received the assent of a majority in number and value of the creditors of the debtor.

In the present case, at the expiration of the 21 days the necessary majority of creditors had not assented, and, accordingly, because there was not a majority of creditors assenting to the deed, the deed became void as from that date. In truth, the deed was never effective at all, because it was not a case where there was a majority, and subsequently a bankruptcy petition or a bankruptcy decree, but it was a case where the necessary majority of creditors did not assent, and, accordingly, the deed never really became effective at all.

The only other section to which I need refer is sect. 21, which really has nothing to do with what I have to consider. Sect. 21 provides as follows:

> Where a deed of arrangement is avoided by reason of the bankruptcy of the debtor, any expenses properly incurred by the trustee under the deed in the performance of any of the duties imposed on him by this Act shall be allowed or paid him by the trustee in the bankruptcy as a first charge on the estate.

It has been held that such expenses as those are strictly limited to expenses and debts imposed by the Act. In my judgment, sect. 21, having regard to the facts in this case, has no application at all. There is nothing in the Act itself, so far as I can see, which authorises the payment of expenses in a case such as this, where the deed never became an effective deed at all because of the failure to obtain the assent of the majority of the creditors. In my judgment, so far as any attempt was made—in fact, it was not made, because counsel for the respondent did not put his case in that way—to rely on sect. 21 of the Act, it would not have assisted the respondent in the least, and he does not in fact claim that he is really entitled to anything as expenses. The way in which counsel for the respondent put it, however, is this. He says that, in so far as the general body of creditors have benefited by the acts done by the trustee under the non-effective deed, the acts have resulted in a benefit to them, so that they have taken some benefit which they could have obtained only by virtue of his exertion. In such a case as that, it is inequitable to permit the creditors to take the benefit which has been acquired in that way and at the same time to refuse the person who has obtained that benefit for them any consideration or remuneration in respect of it.

It is said that, where a person has expended money, or has put himself to expense, and, as a result of his own exertions, benefited the creditors, then the equity of the matter requires that he shall have some compensation for what he has done. It is not put, as I follow the argument, that there is anything in the Act itself which in terms justifies or permits such payments to be made, but it is said that the court has a general jurisdiction to see that somebody who has in fact, by his labours or expenditure of money acquired a benefit which has passed to the general body of creditors, has some recompense for the expense or trouble to which he has been put. I may say at once that I do not think that there is anything in the Act which would enable the trustee in bankruptcy to permit any such allowance to be made. I think that it is a case where, if any such allowance is going to be made, or should be made, it should be made by the court, and by the court only.

In my judgment, the trustee in bankruptcy in this case was amply justified in saying that he could not allow these deductions to be made, and in coming to the court, as he has done, for the assistance of the court in the matter. It does not follow from that, however, that there may not be jurisdiction in the court itself in a proper case to allow something to a person in the position of this respondent by way of compensation or otherwise for trouble or expense to which he has been put. In my judgment, it is a case where the court acts only in rather exceptional circumstances. In the present case, the respondent took upon himself the business of seeing that the deed was registered, of collecting the debts, and of carrying on the business to a limited extent. He even went to the length of making or allowing a small payment to be made to the bankrupt himself as an allowance. During the whole of that time, he had no means at all of knowing for certain whether or not the deed would ever become an effective deed at all. Of course, if the necessary assent had been obtained, he could then have said : "This has been for the benefit of the creditors who assented to the deed, and the fact that I came in before I was safeguarded by any provisions in the Act cannot be held against me." If, however, a person elects to act in the way in which this gentleman did, it may well be only with the intention of assisting the general body of creditors, but, if he chooses to act in the way he has done, then he does it at his own risk, and, if he expends time, labour or money in doing what he has done, that is something which he is doing only and entirely at his own risk, without any sort of right to recover anything in respect of it. In my judgment, there may be cases in which so obvious a benefit has resulted from the acts which the person in that position has chosen to do that it would be manifestly unfair to permit the creditors to receive such benefit without making some return to the person who had earned that benefit for them, but, before the court could permit that to be done, in my judgment, it would have to be satisfied beyond all reasonable doubt that the exertions in respect of which some claim was made had resulted in a real benefit to the creditors.

In the present case, it is said that, by collecting the debts, the respondent prevented the money from getting into the hands of the bankrupt, and thereby enabled the money to be paid over to the trustee in bankruptcy. It is also said that, by his carrying on the business as he did for a time, again some benefit resulted to the creditors. With regard to those matters, it may be that the general body of creditors have to some extent benefited, but I am not satisfied that that is so. I have no evidence before me that the bankrupt would have collected these debts, and so diverted them from the trustee in bankruptcy. I have no evidence that there has been any real benefit to the general body of creditors by reason of the action of the respondent. I do feel some little sympathy with the respondent, merely because it is very hard lines on anyone who expends money for somebody else and has eventually to bear the costs out of his own pocket, but the answer to all that is: "You, the respondent, should not have come in and done what you did, in the circumstances of this case, until you were satisfied A that the deed under which you purported to act was going to be affirmed by the general body of creditors, so that your position was secure." Generally speaking, if a person in the position of the respondent here chooses to come in and chooses to put his hand in his pocket and expend money in the matter, he is doing it entirely at his own risk, except in a B very exceptional case where the benefit which has resulted from his exertions is clearly manifest, which is not this case. In my judgment, the respondent has only himself to thank for the position in which he now finds himself. In my judgment, the proper order to make on this motion is that the respondent be ordered to pay over the money in C question—namely, £121 5*s.* 10*d.*—and that he must pay the costs in this motion.

Order for payment over of £121 5*s.* 10*d. and costs.*

Solicitors: *Zeffertt & Heard* (for the applicant); *McKenna & Co.* (for the respondent). D

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

HEMELEERS-SHENLEY *v.* THE AMAZONE, *Re* THE AMAZONE.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 14, 1939.**]

Constitutional Law—Diplomatic privilege—Immunity from legal process—Nature and extent of immunity of assistant military attaché—Diplomatic Privileges Act, 1708 (*c.* 12), *s.* 3.

The plaintiff was the wife of the defendant, the assistant military attaché to the Belgian Embassy. She put him in funds to enable him to buy a yacht, the Amazone, and he was registered as the proprietor of it. Later, she contended that she was the owner of the yacht, and issued a writ to have possession of it decreed to her. The defendant moved to have the writ set aside on the ground of diplomatic privilege. It was contended by the plaintiff that, because the defendant's name was included in the list prepared under the Diplomatic Privileges Act, 1708, he could show diplomatic privilege only under that Act, and that by sect. 3 of the Act he could claim protection only after he had shown that the yacht was actually his property, a matter which could only be determined after the action had been heard and determined :—

HELD : (i) the defendant was a diplomatic agent accredited to the Crown by a foreign state, and hence was entitled at common law to immunity from legal process.

(ii) this immunity was not affected by the Diplomatic Privileges Act, 1708, which is confirmatory of, and does not supersede, the common law.

[EDITORIAL NOTE. The question here discussed is of importance, since, if the attaché obtained his privilege only under the Act of 1708, it might be that he could prove his claim to it only after the fact that the goods were his had been established. This difficulty, however, does not arise, since it is held that that Act does not exhaustively define the nature of diplomatic privilege, but is only confirmatory of the common law.

AS TO DIPLOMATIC OFFICERS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 29, 30, para. 31 ; and FOR CASES, see DIGEST, Vol. 11, pp. 536-541, Nos. 390-453.]

Cases referred to :

(1) *Parkinson* v. *Potter* (1885), 16 Q.B.D. 152 ; 11 Digest 538, *409* ; 55 L.J.Q.B. 153 ; 53 L.T. 818.

(2) *Engelke* v. *Musmann,* [1928] A.C. 433 ; Digest Supp. ; 97 L.J.K.B. 789 ; 139 L.T. 586 ; *revsg.,* [1928] 1 K.B. 90.

(3) *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94 ; 11 Digest 536, *391* ; 28 L.J.Q.B. 310 ; 34 L.T.O.S. 30.

INTERLOCUTORY APPEAL by the plaintiff from a judgment of LANGTON, J., dated May 8, 1939. The plaintiff claimed possession of the Amazone, and the defendant pleaded diplomatic immunity. The Foreign Office certified that the plaintiff's husband had been received as assistant military attaché to the Belgian Embassy. The facts are fully set out in the judgment of SLESSER, L.J.

G. St.C. Pilcher, K.C., and *Owen L. Bateson* for the appellant.

H. G. Willmer, K.C., and *Guy N. W. Boyes* (for *J. V. Naisby*, on war service) for the respondent.

Pilcher, K.C. : The immunity enjoyed by a sovereign state differs in quality and extent from that enjoyed by an ambassador and his suite. The immunity of the state is based on common law and the comity of nations. That of the ambassador derives exclusively from the Diplomatic Privileges Act, 1708, and is limited by its wording. The statute will protect the respondent only if he can prove ownership of the goods the subject of the action.

Willmer, K.C., was not called upon in reply.

Slesser, L.J.: The plaintiff is the wife of a gentleman who at all material times was the assistant military attaché to the Belgian Embassy. It appears from the evidence on affidavit that she was a very wealthy woman, and from time to time she assisted her husband and enabled him to live in that state of life which they thought appropriate. Among other things, it appears that he was put financially into a position to order Messrs. Thornycroft to construct a yacht, the Amazone. This boat was built apparently entirely to the orders of Commandant Hemeleers-Shenley. He discharged, so far as regards Messrs. Thornycroft, any financial liabilities which arose from the building of the boat, and his name appears in the register as the proprietor of the boat. Nevertheless, disputes having unfortunately arisen between the husband and wife, the wife contends that she is the owner of the boat. By her writ, dated Mar. 30, 1939, she claims, as sole owner of the Amazone, to have possession decreed to her of the vessel.

The judge has come to the conclusion that the possession of this boat is now in the husband, and, so far as that matter is concerned, I think that the judge was right in coming to that conclusion. Indeed, it appears to be conceded by the affidavits filed on behalf of the plaintiff, and it is so stated in the affidavit of the husband. What is said, however, is that the husband is immune from being impleaded in this action to test whether or not he is the owner of this vessel and entitled to possession, by reason of the fact that, as is stated by the Foreign Office, he possesses diplomatic privilege. It is said by counsel for the appellant that the certificate of diplomatic privilege, having stated that the defendant is assistant military attaché, goes on to say that his name has been included in the list prepared under the Diplomatic Privileges Act, 1708, and it is argued that, by reason of the facts that his name appears in that list and that there is no statement by the Foreign Office beyond that, if in fact he cannot show diplomatic immunity under that statute, he cannot resist these proceedings.

In my view, however, that is to put entirely too narrow a construction upon the certificate of diplomatic privilege of the Foreign Office. True it is that his name may be included in that list, but I read this certificate as informing the court, as it does state, that he is the assistant military attaché, and that he is a person having diplomatic privilege, not only under the statute, but also under the common law—such privilege as would normally attach to an assistant military attaché.

What is stated by counsel for the appellant is this. He draws attention to the Diplomatic Privileges Act, 1708, and says that, if reliance is to be placed upon that statute, then the language of sect. 3 is not sufficient to enable the respondent here to avail himself of its protection unless he can show that the goods referred to in the action are actually his—a matter which can only be determined after the action has been heard and determined. The statute first recites as follows:

A
> Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Mattueof, Ambassador Extraordinary of his Czarish Majesty . . .

Then in sect. 3 appear these words:

B
> And to prevent the like insolencies for the future, be it further declared by the authority aforesaid, that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or state, authorised and received as such by Her Majesty, her heirs or successors, or the domestic, or domestic servant of any such ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

C Counsel for the appellant says that it has not yet been established that these are the goods or chattels of the defendant, and, therefore, that the question whether or not they may be "distrained, seized or attached"—matters prohibited by the statute—cannot be said necessarily to affect this husband as a diplomatic servant until that matter has been litigated.

D It is clear, I think, and it has been stated very clearly in earlier cases—it is not necessary to state it again—that this was merely in the nature of a penal statute, as the preamble says, to deal with the persons who do the kind of things struck at by the preamble. Sect. 4, for example, provides for punishment of attorneys who seek to enforce process, and E says that they shall suffer:

> . . . such pains, penalties, and corporal punishment, as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.

I do not know that any attorney has ever been corporally punished under this statute for such proceedings. It may be that, in a certain view, the F attorneys in this case are in peril of receiving such punishment, but we have not to adjudicate upon that point.

This question in substance has already been considered, and, I think, decided, in *Parkinson* v. *Potter* (1), in which it is assumed—and earlier cases have said the same thing—that the Diplomatic Privileges Act, G 1708, is by no means exhaustive of the common law dealing with diplomatic immunity. In that case, an action was brought on a lease against an attaché of a foreign embassy, and it was argued, rather as it is argued here, that the language of the statute was not satisfied because it was not shown that the goods were the property of the person seeking H the diplomatic immunity, and that in the Diplomatic Privileges Act, 1708, there is no mention of an attaché, which is perfectly true. It deals with the ambassador and his domestic servants. However, MATHEW, J., disposing of that argument, says, at p. 157:

> Then it was urged that, assuming that De Basto was an attaché, it did not follow that he was within the privilege of the embassy; and our attention was

called to the provisions of the Diplomatic Privileges Act, 1708, s. 3, which only mentions the ambassador and his domestic servants. But it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and according to that law it is clear that all persons associated in the performance of the duties of the embassy are privileged, and that an attaché is within that privilege.

That being so, I ask myself what the privilege is, quite apart from the Diplomatic Privileges Act, 1708, and how far it extends. I think that all the textbooks and authorities agree, and I do not think that it is necessary to give any very copious citations. So far as textbooks are concerned, I will content myself with quoting DICEY'S CONFLICT OF LAWS, 5th Edn, p. 196 : A B

> An ambassador or other diplomatic agent accredited to the Crown by a foreign state cannot, at any rate without his sovereign's consent, be made defendant here in an action either for breach of contract, or, it would seem, for tort, nor can his property be seized.

There is nothing, I think, in any of the authorities to throw doubt upon that proposition except an early statement in COKE'S INSTITUTES, which qualifies the immunity of the ambassador in a way with which everyone has disagreed ever since. C

Finally, I may mention the observations of LORD WARRINGTON OF CLYFFE in *Engelke* v. *Musmann* (2), at p. 458 : D

> I have also thought it unnecessary to say anything about the Diplomatic Privileges Act, 1708. It is well settled that the questions we have been discussing do not depend on the statute, but are principles of common law having their origin in the idea of the comity of nations.

Counsel for the appellant is prepared to admit that, once we may travel outside the Diplomatic Privileges Act, 1708, subject to the doubt expressed as to whether this person is a diplomatic agent otherwise than for the purpose of the statute, there would be here a complete protection. In this action, there can be no doubt at all that this husband, Commandant Hemeleers-Shenley, who is impleaded, is a person coming within the privilege of the embassy. Once that is established, it follows from all the authorities, from Grotius downwards, that he may claim his immunity. In my view, the judge was right in coming to the conclusion to which he did come. I myself express no opinion as to whether or not the respondent is protected under the Diplomatic Privileges Act, 1708 It is sufficient for my purpose to say that he can derive his protection from the common law. I think, therefore, that this appeal fails. E F G

MACKINNON, L.J. : I agree. Counsel for the appellant has argued this appeal very gallantly and at great length. The argument is that, inasmuch as the words of sect. 3 of the Act do not exactly fit the nature of the present proceedings, therefore they cannot be stopped on the application of the respondent. However, it is perfectly natural that sect. 3 of the Act should have referred to the matter in the way in which it does, because at that time the normal way of commencing any civil proceeding was by arrest, by civil process or by distraint. It is perfectly H plain under the authorities that the Act was not meant to define exhaustively the nature of the diplomatic privilege, but was merely confirmatory of the common law. Slesser, L.J., has referred to several authorities in which that has been laid down. There is only one further case which I think is equally clear and might be referred to, and that is A *Magdalena Steam Navigation Co.* v. *Martin* (3). In that case, a similar question arose, and a kindred argument upon the terms of the Diplomatic Privileges Act, 1708, was addressed to the court. Lord Campbell, C.J., deals with that and deals with the authorities, and says, at p. 114:

> B Reference was frequently made during the argument to the Diplomatic Privileges Act, 1708; but it can be of no service to the plaintiffs.

Then he discusses that, and says, at p. 115:

> At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the courts of the country to which they are accredited.

C That is repeated in the last sentence of his judgment, at pp. 115, 116:

> It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant.

D I agree with that. I think that this appeal is quite unfounded, and, I was going to say, quite a hopeless one, and that it should be dismissed with costs.

E Goddard, L.J.: I agree. It is well-established that it is the common law of this country that not only ambassadors but also members of their suites are exempt from judicial process. The Diplomatic Privileges Act, 1708, is declaratory in sects. 1, 2 and 3, and it really does not achieve any addition to the law by its subsequent sections, because F sect. 4 imposes penalties on attorneys, solicitors, sheriffs, bailiffs and other ministers of justice who issue or execute writs against the person of the ambassador or his suite. Then sect. 5 provides that persons subject to the bankruptcy laws who put themselves into the service of any such ambassador or public minister—that is to say, traders—shall G not take any manner of benefit by the Act. That may or may not mean that, if a trader attaches himself to the suite of an ambassador, he shall not have any immunity, but I think that it will certainly prevent sect. 4 from having any effect, so that a solicitor who sues a person within the description of sect. 5 will not be liable to any pains and H penalties under sect. 4. Sect. 5 gives immunity also from the penalties if the solicitor sues a person who is not on what is commonly called the Diplomatic List. It provides as follows:

> . . . no person shall be proceeded against as having arrested the servant of an ambassador or public minister, by virtue of this Act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex . . .

This is a striking instance of the inaccuracy of a marginal note, because the marginal note is as follows:

> No merchant &c. to have any benefit of this Act. Nor the servant of an ambassador, unless his name be registered &c.

That is not what the section provides. It says that solicitors and others A are not to be liable to penalties for proceeding against servants of an ambassador who are not registered, and it has since been held that, though a servant is not registered, he may yet have diplomatic privilege. Also, I agree with MacKinnon, L.J., that in the time of Queen Anne all common law actions which were started in the Queen's Bench B in Middlesex by a writ of *latitat*, or in the Common Pleas by a writ of *capias*, or by similar processes in the Court of Exchequer, proceeded for the arrest of the defendant, or, if that could not be effected, by a writ of *distringas* on his goods to compel him to put in an appearance, and, therefore, that those common law processes were contemplated C by sect. 3 was no more than logical. I agree that this appeal should be dismissed.

Appeal dismissed with costs. Vessel ordered to be released.

Solicitors: *Janson, Cobb, Pearson & Co.* (for the appellant); *Stephenson, Harwood & Tatham* (for the respondent). D

[*Reported by* Derek H. Kitchin, Esq, *Barrister-at-Law.*]

GAMBLING *v.* BENHAM.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **December 4, 1939.]**

Negligence—Damages—Personal injuries—Loss of expectation of life—Child aged 2½ years—Amount of assessment.

A boy of the age of two-and-a-half years was killed in a road accident. The damages for loss of expectation of life were assessed at £1,200 :—

HELD (*per* SLESSER and MACKINNON, L.JJ., GODDARD, L.J., dissenting) : the damages given were not so different from those in the reported decisions that they should be disturbed or re-assessed in the Court of Appeal.

(*per* GODDARD, L.J.) : the damages should have been reduced to £350.

[EDITORIAL NOTE. This decision, if the case is taken to the House of Lords, can be of ephemeral interest only, but it seems clear that the divergence of view here expressed is a matter of the first importance, not only to litigants whose cases come before the courts for decision, but also to those who settle such claims out of court.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016 ; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to :

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354 ; Digest Supp. ; 104 L.J.K.B. 199 ; 152 L.T. 231.

(2) *Bailey* v. *Howard*, [1939] 1 K.B. 453 ; [1938] 4 All E.R. 827 ; Digest Supp. ; 108 L.J.K.B. 182 ; 160 L.T. 87.

(3) *Rose* v. *Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

(4) *Shepherd* v. *Hunter*, [1938] 2 All E.R. 587 ; Digest Supp.

(5) *The Aizkarai Mendi*, [1938] P. 263 ; [1938] 3 All E.R. 483 ; Digest Supp ; 107 L.J.P. 141 ; 159 L.T. 490.

(6) *Owen* v. *Sykes*, [1936] 1 K.B. 192 ; Digest Supp. ; 105 L.J.K.B. 32 ; 154 L.T. 82.

(7) *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.*, [1934] S.C. 79.

(8) *Ellis* v. *Raine*, [1939] 2 K.B. 180 ; [1939] 1 All E.R. 104 ; Digest Supp. ; 108 L.J.K.B. 292 ; 161 L.T. 234.

APPEAL by the defendant from a judgment of ASQUITH, J., given at the Winchester Assizes, on July 21, 1939. The facts are fully set out in the judgment of SLESSER, L.J.

N. L. C. Macaskie, K.C., and *Humfrey H. Edmunds* for the appellant.

Cecil R. Havers, K.C., and *Malcolm McGougan* for the respondent.

Macaskie, K.C. : The judge was wrong in ignoring the age of the deceased. An infant of this age falls within the category of special cases, mentioned by LORD WRIGHT, in *Rose* v. *Ford* (3), of persons whose life is worth less than the normal amount on account of some disadvantage, such as imbecility or incurable invalidism. A young child cannot consciously appreciate the value of his life. Moreover, his future is uncertain. His life may bring disappointment and privation equally with good fortune and advantage. His expectation of life cannot, therefore, be as valuable as that of a young man entering on a profession, who has a certain expectation of the good things of life. The damage suffered is loss of the good things, and not of the span, of life, and the expectation of these for a young infant is highly uncertain. It is also undesirable that judges should vary in their assessment of the value of expectation of life.

Havers, K.C.: When hearing an appeal against an award of damages by a judge sitting without a jury, this court does not interfere with the award, even if it is different from that which this court would have made, unless it concludes that the judge acted upon a wrong principle of law, or that his estimate of the damages to which the plaintiff was entitled was entirely erroneous : *Flint* v. *Lovell* (1) and *Owen* v. *Sykes* (6). In this case, the only error in law which is suggested is that the judge misdirected himself on the meaning to be attached to the *dictum* of LORD WRIGHT, in *Rose* v. *Ford* (3), where LORD WRIGHT included an infant within a special category of persons. In *Shepherd* v. *Hunter* (4), SLESSER, L.J., discusses this *dictum*, and indicates that, though it may be necessary to make allowance for the greater risks to which a very young infant is exposed, it is also necessary to take into consideration the infant's greater expectation of life. It is apparent from the judgment of ASQUITH, J., that he gave full weight to the special risks to which very young infants are exposed, and, therefore, in assessing damages, he did not follow a wrong principle of law. With regard to the amount, in *Bailey* v. *Howard* (2) this court refused to disturb an award of £1,000 for loss of expectation of life to a child of 3 years of age, and both in that case and in *Shepherd* v. *Hunter* (4) MACKINNON, L.J., expressed the difficulty he felt in assessing damages in such a case. If this court were unable to disturb an award of £1,000 to the estate of a child of 3 years of age, it is equally unable to disturb an award of £1,200 to the estate of a child of 2½ years of age.

SLESSER, L.J.: This case raises in a new form the problem which has been many times before this court—namely, whether the judge in this case, who was not assisted by a jury, gave a sum to an administrator of the estate of the deceased infant, Wallace Archibald Gambling, which was so wrong an estimate of the damage suffered by the infant as to justify this court in interfering with the judgment. The child in question was killed through what is admitted to be the negligence of the appellant, and was a child of very tender years. Indeed, at the time of the death the child was, I think, some 2½ years of age. The damages which were awarded to the administrator in respect of the loss of expectation of life of this child under the Law Reform (Miscellaneous Provisions) Act, 1934, were £1,200. Damage was not given on any other basis, except a small sum in respect of funeral expenses.

The grounds on which this court will interfere in such a case have been stated more than once to follow the criterion laid down by GREER, L.J., in *Flint* v. *Lovell* (1), at p. 360. There is really no suggestion that the judge here acted upon any real principle of law, and, if the matter is to be considered at all in relation to the observations of GREER, L.J., I think that it must be upon the ground that the amount awarded was so extemely high as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled. In order to come to any conclusion on that matter, one has, I think, to some extent to be guided by what have been considered in similar circumstances to be estimates of damages which ought not to be disturbed by this court. There has been cited to us *Bailey* v. *Howard* (2), a case of an infant of 3 years, where the sum of £1,000 in respect of the loss of expectation of life was considered by this court to be a sum which should not be disturbed. The only difference between the facts of that case and those of this case is that here the child was 2½ years of age, whereas the child killed in *Bailey* v. *Howard* (2) was 3 years of age, and the sum awarded was £1,000 in that case and £1,200 in this case. In *Bailey* v. *Howard* (2), SCOTT, L.J., says, at p. 456 ([1938] 4 All E.R., at p. 830), that awards of damages should, as I understand it, be disturbed in such a case as this only on the ground that they are hopelessly inadequate or excessive. To use other language, that is very much the test which was applied by GREER, L.J., in *Flint* v. *Lovell* (1), where £1,000 had been awarded to a person then living, who was an elderly man of some 70 years of age.

In this case, I find it extremely difficult to say that the award of £1,200 is so excessive as to justify us in saying it is hopelessly excessive or altogether improper, so as to justify this court in interfering. The deceased person here was an infant, a very young child, and some discussion has taken place on a matter which, I think, can be finally set at rest only in the highest tribunal—namely, as to what special treatment is to be accorded to a child of very tender years. It is quite true that in *Rose* v. *Ford* (3) LORD WRIGHT, who is the only member of the House of Lords who dealt with the question of infancy—it was there *obiter*, as the injured person was a girl of 19—speaks of certain special cases, at p. 850 ([1937] 3 All E.R., at p. 373):

> . . . such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties. The judge or jury must do the best they can in the circumstances in this as in other cases.

I do not wish to repeat my own view of what the opinion of LORD WRIGHT there means, which I have already expressed in *Shepherd* v. *Hunter* (4), but to my mind, whatever else is true, the fact emerges that an infant is not in the same class of case as are some of the other persons mentioned by LORD WRIGHT, the imbecile and the person in distressed circumstances. It may well be, and it is a view which I expressed in *Shepherd* v. *Hunter* (4), that all that is meant is that, if the view expressed by LANGTON, J., in the *Aizkarai Mendi* (5)—namely, that the age factor can be taken into account, and that it follows that, the expectation of life of young men exceeding that of older men, other things being equal, they would receive greater compensation if they were killed, or rather, the estate would receive it—is right, then it may be that all that LORD WRIGHT means is that one is not to apply any such simple test when dealing with a young child. However that may be, I think that it is impossible to say that a child of 2½ years of age, who, according to the evidence has an expectation of life of some 55 years, is receiving too much compensation, in the sense that we should be called upon to disturb the amount awarded, when £1,200 is given in relation to the loss of life, which may extend over another 50 years. I find it impossible to disturb this finding, for the reasons which prevented the court from disturbing the finding of the judge and jury in *Bailey* v. *Howard* (2). It is said that there there was a jury, whereas in the present case there is not. It seems to me, however, that, so far as regards this matter, the principles which have been accepted by this court in *Owen* v. *Sykes* (6), expressed by GREER, L.J., should be applied where the judge is sitting alone and has to estimate the damage, and that, on that view, this case cannot be distinguished from *Bailey* v. *Howard* (2), and the mere fact that this child received £200 more, and was 6 months younger, does not so distinguish it from that authority as to make it right to say that these damages should be disturbed or re-assessed in this court. I think that this appeal fails.

MACKINNON, L.J. : This appeal, in the opinion of SLESSER, L.J., should be dismissed. I rather gather that the opinion of GODDARD, L.J., is that it should be allowed. I am very much tempted to say that I agree with both of them, but that, I fear, is a course not open to me. A good many cases have been cited to us in which this most obscure matter has been debated. The only sentiment on this topic to which I find I have been committed in those cases is that I have said that I have no idea of the proper basis on which to estimate damages for the loss of expectation of life of anyone, at any age, and I have been, and am, unable to find that any guidance has been provided by the House of Lords, or any indication of the principles which I ought to apply in order to estimate what is right. I am glad to think that I have never had to face the problem of estimating a sum as a judge of first instance. In the Court of Appeal, I see that I expressed a hopeless inability to understand the problem in one case where £90 was given and an appeal was brought saying that it was too small. I said that I could not agree that it was too small, because I did not know what was the proper figure. In another case, where £1,000 was given, and there was an appeal on the ground that it was too much, I intimated the same opinion. I could not say that it was too much, because I did not know what the proper figure was. Unhappily, I find myself in the same state of mind in regard to this case. The utmost at which I can arrive is that, if £1,000 was right in *Rose* v. *Ford* (3), the case of the girl of 19 or 20 years of age, then it looks as though £1,200 for this child of 2½ years of age is too much. However, I still find myself in the position of being compelled to say that I cannot say that £1,200 is too much, because I have no idea what the proper figure is. In the result, I agree with Slesser, L.J., that this appeal fails.

Goddard, L.J.: For myself, I would allow this appeal. Naturally, I can only differ on a matter of this sort with considerable difficulty, but I have less hesitation, for the reason, and for the reason only, that I think that the sooner the attention of the legislature is called to the fact that a great divergence of judicial opinion exists on what is the proper sum to award in these cases, and the sooner we get some assistance, if it be within the power of mortal man to give assistance, on this subject from the House of Lords, the better.

I should like to say, first of all, that I have no intention whatever of departing from the cardinal principles of English law, such as *stare decisis*. If I thought that, in differing from Slesser and MacKinnon, L.JJ., I was refusing to follow cases which were binding on me, I should not do it. However, I do not think that I am. I am approaching this case, I hope, bearing in mind the principles which guide the ordering of a new trial or a reduction of damages, or an increase of damages, where those damages have been fixed by a judge, and, if the damages seem to me to be extremely high, to use an expression used by Greer, L.J., in *Flint* v. *Lovell* (1), then I think that I ought not to be afraid of expressing my opinion that the damages are excessive.

I said a word just now about the divergence of judicial opinion which there is in this case. Everyone knows that that is so. Some judges have awarded quite substantial damages—in this case, over £1,000—while others have been content to award quite moderate damages, round about £200, £300 or £500, and no one has yet been able to find any particular principle which is to guide the court in dealing with these damages. I cannot help feeling that recently, at any rate, there has been a tendency for these damages to increase, exactly as Lord Roche, in *Rose* v. *Ford* (3), foresaw that they might. He said, at pp. 861, 862 ([1937] 3 All E.R., at p. 381):

> I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and becoming common form may result in the inflation of damages in undeserving cases, or, more probably perhaps, may become stale and ridiculous to the detriment of real and deserving cases, such as the present.

Of course, bearing in mind that I am differing from a judge so careful as Asquith, J., I should not for a moment describe this case as an undeserving case, but it does seem to me, and I cannot help saying it, that damages of £1,200 in a case of this sort are not only extremely high, but are also, in my view, excessive. One difficulty with which one is faced in these cases is this. One knows that, in trying accident cases, one frequently has to apply one's mind to the task of compensating for pain and suffering. Under the Fatal Accidents Act, one would not have to consider pain and suffering, but one may have to now. At any rate, in non-fatal cases one has to apply one's mind to that problem, and I can well understand its being said that it is no more difficult to award damages for pain and suffering because one cannot measure them than it is to award damages for loss of expectation of life. However, there is, it seems to me, this great difference. When one is dealing with cases of loss of expectation of life, stripped of all technicalities, one is giving a *solatium*, not to the person who is injured, for the person who is injured is dead, but nominally to the executor or administrator who is suing. When a person is injured, one has to think of the extent of the injury, and give a sum of money as a *solatium* to the person who has suffered the injury. In this particular case, one is in effect, though, I agree, not in theory, merely giving a *solatium* to the parent for the loss of the child. That is a perfectly impossible sum to estimate. One must try to estimate it by considering what the value of the child's life was to the child. There again one is met with an impossible proposition, because a person's life cannot be measured by money or by any standard applicable to human affairs. What one is really doing, and what I think both LORD SANDS in *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.* (7), cited with approval in the House of Lords in *Rose* v. *Ford* (3), and LORD WRIGHT and LORD ROCHE meant, was that one must add something to the damages, or give some *solatium* which ought to be of a moderate amount.

Now comes the question as to whether the fact that the child is an infant, by which I mean a baby, should be taken into account. I confess that for myself I read the passage which has been cited from the opinion of LORD WRIGHT as meaning that one should take that into account by way of minimising the damages, because, when I look at the words which immediately precede the passage where he is saying that the consideration is " what is fair and moderate in view of all the uncertainties and contingencies of human life," for myself I should read that as meaning that, where one is dealing with a case of a baby, or a very young child, it is far more difficult to say what his chances of the advantages of human life are than in the case of an adult, not necessarily of full age, but grown up and embarking, or about to embark, on life, having finished his education and being about to start in some definite calling. With an infant, one does not know that its parents will live, or that it will have any education. It is far more exposed to certain dangers, and so forth, and it is altogether far more difficult with a baby of a few months, or even a few years, it seems to me, to come to a fair sum than is the case with another person. Certainly I should feel that in such a case any estimate based upon the probable length of life was entirely fallacious. Yet that is one of the very few guides, if it be a guide, which has been given to the court as to the principles upon which one is to assess damages. In truth, there is no principle, as it seems to me, and it seems to me that there can be no principle, beyond the principle that one is to give what is fair and moderate and to use common sense. I find that MACNAGHTEN, J., recently in the case of a child of 4 years of age, applying those tests, fixed the sum of £350 as a fair sum, and that is just about the sum which I myself would give. It may be too low. Double it, and one is still £500 off the £1,200 given in this case. Again, as I say, I do not know what principle to apply. It must be largely a matter of impression, and I am bound to say that £1,200 does strike me as excessive in such a case as this.

I ought to say one other word. I am well aware that in *Bailey* v. *Howard* (2) this court refused to interfere with the verdict of the jury, who awarded £1,000 to a child not very much older than this one. I am equally well aware that in *Shepherd* v. *Hunter* (4) this court did interfere where a jury, which LORD ROCHE in *Rose* v. *Ford* (3) said was particularly the tribunal to assess damages in this class of case, had awarded £90. If the court, in the circumstances of the case, felt that the rules which apply to interfering with the sum found by a jury prevented them from questioning the amount in *Bailey* v. *Howard* (2), I should be the last to differ from them. However, I do not think that this court has laid down by *Bailey* v. *Howard* (2) or by *Shepherd* v. *Hunter* (4) any principle or rule. They did not mean to say, as MACKINNON, L.J., and I said in *Ellis* v. *Raine* (8), that we did not regard *Shepherd* v. *Hunter* (4) as saying that one must give more than £90. I do not think that in *Bailey* v. *Howard* (2) the court said that in no case would they interfere with a verdict for £1,000, but very different considerations from those which apply to an award by a judge apply to the verdict of a jury. I merely mention those cases to show that I have not overlooked them. I hope that, by differing, I am in no way infringing the rule of *stare decisis.* I feel that the sum of £350 would have been enough to give in such a case as this, and, in my opinion, the appeal should be allowed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *C. Howe Browne* (for the appellant); *Mackrell, Maton, Godlee & Quincey,* agents for *Talbot & Davies,* Andover (for the respondent).

Reported by DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

MILLS CONDUIT INVESTMENTS, LTD. *v.* TATTERSALL.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge), **November 29, 1939.**]

Moneylending—Memorandum of loan agreement—Loan secured by promissory note—Ambiguity in stating effect of promissory note—Promissory note only consistent with one view of memorandum—Moneylenders Act, 1927 (c. 21), *s.* 6.

The memorandum of a moneylender's contract stated that £100 was advanced on a promissory note payable three months after date, and that, in case of default, "the same" should bear interest in respect of principal or interest at simple interest on that sum at 120 per cent. per annum, and that all payments on account of the advance and interest should be applied in payment of interest due to the date of such payment and then of principal. The promissory note stated that, in the event of default of payment, the balance and interest remaining due, whether in respect of principal or interest, should bear interest on that sum at 120 per cent. per annum. It was contended that the memorandum was not in conformity with the statutory requirements on account of the ambiguity of the words "the same":—

Held: the memorandum was capable of two meanings, but, as one of them was as open to the reader as the other, and as that one was consistent with the terms of the promissory note and correctly represented the true agreement between the parties, the memorandum was a sufficient compliance with the Act.

[**EDITORIAL NOTE.** Generally speaking, ambiguity would be fatal to a memorandum; but here the ambiguity is merely in stating the effect of the promissory note, and such ambiguity as there is is only a possible misreading of the memorandum. The correct reading is shown to be equally open to the borrower or any other reader of the memorandum, and one reading is quite consistent with the terms of the promissory note, while the other, having regard to the note, is quite impossible.

As to Sufficiency of Memorandum, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190, 191, para. 280; and for Cases, see DIGEST, Supp., Money and Moneylending, Nos. 353a-353y.]

Case referred to:

(1) *Hoare* v. *Adam Smith* (*London*), *Ltd.*, [1938] 4 All E.R. 283; Digest Supp.

Action by a moneylender claiming the sum due under a moneylending contract, the defence being that the memorandum was ambiguous and not in conformity with the statutory requirements. The facts are fully stated in the judgment.

R. F. Levy, K.C., and *Cyril Salmon* for the plaintiffs.

Leonard Pearl for the defendant.

du Parcq, L.J.: This is an action against the borrower brought by a company who carry on business as moneylenders, and counsel for the defendant has put to me very clearly the point on which he really relies, and that point arises on the memorandum. I need not read the material sections. Sect. 6 of the Act says that there must be a note or memorandum, and by subsect. (2) states that that note or memorandum must contain all the terms of the contract. One of the particular terms it must contain is the interest charged in terms of a rate per cent. per annum. It is quite clear that, if that section is not complied with, the moneylender cannot recover. In this case, somebody who I should think knew his business very well has settled the terms of the memorandum and of the promissory note. The documents were printed, and they were attached to one another. In fact, they formed one document. It is perforated, so that the promissory note can be easily detached from the note or memorandum. When this money came to be lent, however, some bold person in the employ of the moneylending company gave instructions to a typist to strike out a great deal of this carefully settled document and copy in new words, with the not surprising result that rather a hash has been made of the two documents, and counsel for the defendant quite rightly says that this is not as clear as it might be. To that extent, I agree with him. Then he says that in truth the memorandum does not set out the true contract, because, if one compares it with the promissory note, one finds that one says one thing and the other something else. I agree with counsel for the defendant that it is no use saying the memorandum incorporates the promissory note if in A fact, when one looks at the promissory note, it says something different from what is said in the memorandum. That will not do. One cannot correct the memorandum by looking at the promissory note. One may, I think, incorporate the terms of one document by reference into the memorandum, provided that one gives the borrower a copy of the B document so incorporated with the copy of the memorandum. One may incorporate, for instance, the terms of a bill of sale, as I held, in *Hoare* v. *Adam Smith* (*London*), *Ltd.* (1), following a decision of the Court of Appeal. Counsel for the defendant makes this point. He says that, if one looks at the memorandum in this curious form, it says that C 120 per cent. is to be paid as interest, and it goes on: "and in case of default the same shall bear interest." It is not very clear whether "the same" means the promissory note or the £100 which was lent, but I do not know that it matters very much. The memorandum continues as follows:

D . . . in respect of principal or interest at simple interest on that sum at the rate of 120 per cent. per annum.

Counsel for the defendant says that that is either ambiguous or clearly means that the moneylender may charge interest at the agreed rate either on the principal or on the interest, but not on both—in respect E of principal, if he likes, or of interest, if he likes, but not of both. If that is what it means, counsel for the defendant goes on to say, the promissory note says something quite different. If I thought that that was so, I should agree with counsel for the defendant, because the borrower might read through the memorandum and not look at the F promissory note. It does not warn him that he must look at the promissory note. It does not omit terms, on the face of it, which he will find in the promissory note, and so send him to the promissory note to see what they are. The question is whether, on a fair reading of the memorandum, it does mean the same thing as the promissory note. G Although it is quite true that the borrower is not, as I say, referred to the promissory note, still I am disposed to think that, if there is in the memorandum a phrase which may, on the face of it, possibly appear ambiguous, it may well be that, if, when one looks at the promissory note, one finds in it a term quite consistent with one view of the statement H in the memorandum, and quite inconsistent with the other view of it, the memorandum may be regarded as a true statement of the contract. In other words, if a contract is arrived at between the parties and a memorandum which is possibly susceptible of two meanings is given to the borrower, then, if one of those meanings is at least as open to the reader as is the other, and if it correctly represents the agreement, then I do not think that it would be right to say that the memorandum must be regarded as a bad one because one can extract from it another possible meaning which does not truly represent the agreement.

I think the fair way of looking at this case is this. The borrower must know that, if he does not pay principal and interest, there will be outstanding sums of both principal and interest, on which it would A
not be surprising to find that the lender would want to be paid interest, and I think that, if I had read this—and I do not know that I ought to suppose that my knowledge of the Moneylenders Act is better than that of those who borrow, for the defendant had had some experience of it—I should have understood it as meaning that the moneylender B
should be entitled to charge, in respect of principal or interest, interest at the rate of 120 per cent. per annum, in the sense that he could charge interest calculated at that rate whether it was being paid in respect of principal or in respect of interest. It is a perfectly possible meaning of the words, and I am bound to say that I C
think the suggestion of counsel for the defendant that it should be read as meaning that the moneylender can charge interest on the principal or on the interest at his option, but not on both, is really a much more strained interpretation of the words than is the other. It seems to me, therefore, that, so far as there is any ambiguity (and, in a sense, there is D
some ambiguity), anybody knowing a little about the Moneylenders Act, and knowing something about the process of borrowing and lending money, would at once think: "This means that, on whichever I am being charged, and I may be charged on either, I shall be charged at the rate of 120 per cent. per annum." When one gets as far as that, E
I do not think that it is impossible to pray in aid the attached document, the promissory note itself, which, if there is any ambiguity, completely resolves it. I therefore think that this point fails, although counsel for the defendant stated it very clearly and skilfully, and there must be judgment for the plaintiffs for the amount claimed, which is £25 in F
addition to the amount of the writ (whatever that comes to) with costs.

Judgment for the plaintiffs for £154 19*s*. 3*d*. *with costs.*

Solicitors: *Woolfe & Woolfe* (for the plaintiffs); *J. F. B. Satchell* (for the defendant).

[*Reported by* C. St.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RUBIE *v.* FAULKNER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Hilbery and Hallett, JJ.), **January 19, 1940.**]

Street Traffic—Motor vehicle—Learner-driver—" L " sign on vehicle—Duty of supervisor—Road Traffic Act, 1930 (*c.* 43), *s.* 5 (3)—*Motor Vehicles (Driving Licences) Regulations,* 1937 (*S.R. & O.*, 1937, *No.* 438), *reg.* 16 (3) (*a*), (*c*).

The owner of a motor vehicle, who held a provisional licence issued to him under the Road Traffic Act, 1930, s. 5 (3), and whose vehicle displayed the " L " sign in accordance with the Motor Vehicles (Driving Licences) Regulations, 1937, reg. 16 (3) (*c*), was driving it on a certain road. With him in the vehicle as a " supervisor," in accordance with reg. 16 (3) (*a*) of the regulations, was the appellant, who, as a competent driver, had undertaken to act in that capacity at the owner's request. On a bend of the road the owner drew out from behind and attempted to overtake a horse and cart, but, owing to the bend, he was unable to see a motor lorry which was approaching from the opposite direction on its proper side of the road. The engine of his motor van stopped, leaving the vehicle well over the centre of the road, and a collision took place. The appellant was sitting in the passenger's seat on the owner's lefthand side, and saw the horse and cart and the white line in the centre of the road, and he was in a position to see that the owner was about to overtake the horse and cart on the bend, so taking his vehicle to the off side of the white line. The justices convicted the owner of driving without due care and attention, and the appellant of aiding and abetting the commission of the offence. Thereupon the appellant brought this appeal :—

HELD : the regulation provides that a learner-driver shall be allowed to drive a motor vehicle on the highway only on condition that he is under the supervision of an experienced driver, and it was thus open to the justices to find that, as the appellant had remained passive when the circumstances demanded that he should be active, the regulation had not been complied with, and the appellant was rightly convicted.

[**EDITORIAL NOTE.** It may be thought that aiding and abetting postulates an active participation in the offence, but it is here shown that a policy of inactivity, where activity is required, can lead to a successful prosecution.

AS TO LEARNER-DRIVERS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 781, 782, paras. 1220-1222 ; and FOR CASE, see DIGEST, Supp., Street and Aerial Traffic, No. 188b.]

APPEAL by the person supervising the learner-driver by way of case stated from a decision of justices sitting at Saffron Walden in Essex. The facts are fully set out in the judgment of LORD HEWART, L.C.J.

C. B. Marriott, K.C., and *Laurence Vine* for the appellant.

George Pollock for the respondent.

LORD HEWART, L.C.J. : This is a case stated by justices for the county of Essex sitting at Saffron Walden. It arises from an information preferred by the respondent, the superintendent of police, against the appellant for that on a day in Mar., 1939, the appellant unlawfully did aid, abet, counsel and procure contrary to the Summary Jurisdiction Act, 1848, s. 5, one Percy Evans James to commit a certain offence, that is to say, unlawfully to drive a motor vehicle on a road leading from London to Newmarket without due care and attention contrary to the Road Traffic Act, 1930, s. 12. The justices, having heard the information and the evidence, convicted the appellant and fined him a sum of 10*s*. The question raised by this case is whether in so doing the justices came to a correct determination and decision in point of law.

The facts of the case are extremely simple. It is found in the case A
that on this day in March Percy Evans James was driving a motor
vehicle, of which he was the owner, upon the road referred to, that he was
at the time the holder of a provisional licence issued to him under the
Road Traffic Act, 1930, s. 5 (3), and that the vehicle displayed the
appropriate distinguishing marks, as provided for by the Motor Vehicles B
(Driving Licences) Regulations, 1937, reg. 16 (3) (*c*). In other words,
it was made plain that the person referred to was a learner. The case
goes on to find that the appellant was present in that motor vehicle with
Percy Evans James in pursuance of reg. 16 (3) (*a*) of the regulations of
1937, and : C

> . . . as a competent driver had undertaken at the request of the said Percy Evans James to act as supervisor in accordance with that regulation.

That regulation provides as follows :

> (3) A provisional licence shall be granted only subject to the condition that until D
> the holder thereof has passed the appropriate test—(*a*) he shall, except in the case of a vehicle which is not constructed or adapted to carry more than one person, use it only when under the supervision of the holder of a licence other than a provisional licence who has been the holder of a licence for at least 2 years or has passed a test under sect. 6 of the Act of 1934, who shall be present in the vehicle with him . . .

That regulation clearly contemplates and provides that there must be E
present a person who is a supervisor, under whose supervision the holder
of the provisional licence is acting, and without whose presence and
supervision it would not be lawful for the holder of a provisional licence
to be driving a motor vehicle upon the highway. Therefore, there are
clearly contemplated both a duty and a person who is to perform that
duty. The duty obviously comprises the task of supervision, and the F
position of the person is properly called that of a supervisor.

That being the provision of the regulations, what was it that happened here ?

> The said Percy Evans James on a pronounced bend, where the road was 22 ft. G
> wide with a white line in the centre, drew out from behind and attempted to overtake a horse and cart which he was following, being unable, owing to the pronounced bend, to see a motor lorry which was approaching from the opposite direction on its proper side of the road. The engine of his motor vehicle stopped, leaving his motor vehicle well over the centre of the road, and a collision occurred owing to the close proximity of the motor lorry and the fact that the engine stopped.

Then the case contains these significant words, and it is found as a fact : H

> . . . that the appellant, who had been a driver of motor vehicles for 20 years, was sitting in the passenger seat on the lefthand side of the said Percy Evans James and saw the horse and cart aforesaid and the white line in the centre of the road and further was in a position to see that the said Percy Evans James was about to overtake the said horse and cart on the pronounced bend, taking the said motor vehicle to its off side of the white line.

In these circumstances, Percy Evans James was convicted of driving the motor vehicle without due care and attention. Was there material upon which it was open to the justices properly to convict the present appellant as an aider and abettor? It is interesting to see the contentions raised on his behalf. It is said that he was acting in accordance with the Motor Vehicles (Driving Licences) Regulations, 1937, reg. 16 (3) (*a*), and did not have physical control over the motor vehicle, it is said that there was no evidence to prove that the appellant instructed Percy Evans James to do what he did, and, finally, it is contended that the appellant had no time to correct any carelessness on the part of Percy Evans James, and, therefore, that he had committed no offence under the Summary Jurisdiction Act, 1848, s. 5. With regard to that series of contentions, it is interesting to see what he said and what he did. There is not a suggestion from first to last that the person who had undertaken the responsible task of supervision—responsible *vis-à-vis* the public on the highway—did or said anything at all. For all this case contains, he might just as well not have been there. In other words, there might just as well have been no supervisor, and, if there had been no supervisor, then it would not have been right for the holder of a provisional licence to be driving a vehicle upon the highway. On behalf of the respondent, it is contended that, as the appellant was acting in the capacity of supervisor, he was guilty of aiding and abetting the offence which Percy Evans James committed.

The justices, it seems to me, have expressed their opinion with perfect freedom from ambiguity, and, if I may say so, with perfect clearness. They say that, in their opinion, it was the duty of the appellant to have told Percy Evans James not to attempt to pass the horse-drawn vehicle at the place in question immediately Percy Evans James showed that he was intending to do so, and the justices were also of opinion that, by his passive conduct—in other words, by his completely refraining from doing or saying anything in the matter at all—the appellant aided and abetted Percy Evans James to commit the offence. It appears to be argued—I am not sure that I quite do justice to the argument which counsel for the appellant has raised—that, in the circumstances, partly because the lapse of time was extremely brief, the appellant was not called upon to do or say anything, and that he was justified in what the justices describe as "his passive conduct." That argument, I think, ignores the whole intention of this regulation. The only condition, or one of the conditions, upon which the holder of a provisional licence is allowed to drive a vehicle upon the road is that he shall be under the supervision of the holder of a licence other than a provisional licence who shall be a person of experience in the driving of motor vehicles. The essence of the provision is that there must be a supervisor competent to supervise, and it is only if there is such a person present that the driving of a vehicle is permitted by the holder of a provisional licence. The duty being clear on the face of the regulation, it seems to me that it is a pure question of fact for the justices to decide whether or not that duty has been performed. I am bound to say that they do not seem to have received much assistance from the appellant himself. It is inconceivable, the case being stated in the form in which it is, that he alleged that he did or said anything. He seems to have pursued a policy of complete reticence. That being so, it seems to me that it is open to the justices to find, as they did, that, by his passive conduct in circumstances in which what was required was something which was not passive, but active, he aided and abetted the offence. It is only by something of that kind that he could have discharged the duty which he had manifestly undertaken. The importance of this regulation is, of course, the possible consequences to the public who are using the highway, and, on the facts and the findings of fact in the case stated, it seems to me that the justices were quite entitled to come to the conclusion to which they did come—namely, that, by his passive conduct in circumstances in which something was needed to be done in order to fulfil the duties of a supervisor, he aided and abetted the appellant to commit this offence. In these circumstances, I think that this appeal must fail.

Hilbery, J.: I agree. I think that the regulations are framed to make some provision for the protection of the members of the public against the additional dangers to which they are exposed through a car being driven on the road by a driver who is still a learner, and, therefore, assumed to be not fully competent.

Hallett, J.: I agree, and I desire only to make it plain that, like both the other members of the court, I base my judgment upon the consideration of the duty owed to the public as a result of this regulation. If hereafter it should be attempted to be argued in some civil action that the maxim *respondeat supervisor* should be added to the well-known maxim *respondeat superior*, it may be that different considerations will arise which will have to be dealt with by the court which hears that case.

Appeal dismissed with costs.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *E. Tinsley*, Chelmsford (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

WIMBORNE AND CRANBORNE RURAL DISTRICT COUNCIL *v.* EAST DORSET ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Hilbery and Hallett, JJ.), **January 18, 1940.**]

Rates and Rating—Agricultural hereditament—Land partly used for purposes of motor-cycle track racing but otherwise used as pasture land—Whether separately rateable hereditament—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 2 (2).

A. occupied a farm comprising 11 fields, which, as an agricultural hereditament, did not appear in the valuation list. At all material times, one of the fields was used by A. for pasturing cattle in connection with his business as a farmer, but, on 2 afternoons in 1937 and on 4 afternoons in 1938, the field was used by a motor cycle and light car club for the holding of motor-cycle grass track race meetings, when the charge for admission was 1*s.* per head, and in addition charges were made for motor cars, motor cycles and bicycles taken into the field or parked in the adjoining field. On these occasions, the club took £356 in gate money, after allowing for tax. In addition, the club obtained some receipts by letting the right to supply refreshments. Certain money received by the club on these occasions was expended in prize money and expenses. The club paid to A. for the use of the field the sum of 10*s.* per 100 spectators, and during 1938 the sum of £42 14*s.* was so paid. A proposal was made by the rating authority to amend the valuation list by the insertion therein of the field as a separately rateable hereditament, on the grounds that it was occupied and used as a race-course, that it was not land used as pasture ground only, and that it was not agricultural land within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2). The assessment committee rejected the proposal, and, on appeal to quarter sessions, the proposal was upheld. Thereupon this appeal was brought:—

HELD: as the real, substantial and normal user of the field was for the pasturing of cattle and the business of a farm, the hereditament was an agricultural hereditament within the meaning of sect. 2 (2) of the Act of 1928.

[**EDITORIAL NOTE.** Agricultural land means any land used as arable, meadow or pasture ground. This means that the land must be used mainly for these purposes, but use of the land for commercial purposes on three or four occasions in a year will not take it out of the category of agricultural land. This is so even if considerable profit is made on the occasions when it is put to a different use.

AS TO DEFINITION OF AGRICULTURAL LAND, see HALSBURY, Hailsham Edn., Vol. 27, pp. 378, 379, para. 809; and FOR CASES, see DIGEST, Vol. 38, pp. 458, 459, Nos. 230-234.]

Cases referred to:

(1) *Jarvis* v. *Cambridgeshire Rural Assessment Area Assessment Committee, Dawson* v. *Cambridgeshire Rural Assessment Area Assessment Committee,* [1938] 4 All E.R. 186; Digest Supp.

(2) *Tattersall* v. *Marlborough Area Assessment Committee,* Unreported.

APPEAL by the rating authority by way of special case stated from a decision of the committee of the justices of the county of Dorset appointed by quarter sessions for the purposes of the Rating and Valuation (Apportionment) Act, 1928. The facts are fully set out in the judgment of LORD HEWART, L.C.J.

R. M. Montgomery, K.C., and *G. D. Squibb* for the appellants.

J. Scott Henderson for the respondents.

Lord Hewart, L.C.J.: The question in this case arises in the following way. One Atkins was at all material times:

> . . . the occupier of a certain farm, known as the Home Farm, in the parish of Corfe Mullen in the county of Dorset, comprising 11 fields having an area of 150 acres or thereabouts, which as an agricultural hereditament did not appear in the valuation list. A

Afterwards, on Mar. 18, 1939, the appellants, who are the rating authority, made a proposal for the amendment of the valuation list for that parish by the insertion in it of a hereditament consisting of one of the 11 fields of the farm. The proposal was that that field, of an estimated extent of 17 acres, should appear as valued at £50 gross B and £47 rateable.

In Nov., 1938, the proposal was heard by the respondent assessment committee, and they rejected it. Accordingly, the appellants lodged an appeal to quarter sessions, the assessment committee being the respondents. That appeal came on for hearing before the assessment C appeal committee, and certain facts were admitted or proved. They are set out in this case, and it is not necessary to read them all. It is enough to say, I think, that it was found as a fact that:

> Save as hereinafter mentioned, the field, the subject of the said proposal, was at all material times used by the said Atkins for the purpose of pasturing cattle D in connection with his business as a farmer carried on on the Home Farm.

In a later passage of the case, it is found that what was done in the matter of motor-cycle racing:

> . . . did not substantially affect the use of the field as pasture land in connection with the Home Farm aforesaid. E

There, I think, is the foundation of the facts of the case. The normal use of this particular piece of land was use for the purpose of pasturing cattle in connection with the business of a farmer, and that which was otherwise done did not substantially affect the use of the field as pasture land. F

What was otherwise done was that, on 2 afternoons in 1937 and on 4 afternoons in 1938, the particular field was used by the Ringwood Motor Cycle and Light Car Club "for the holding of motor-cycle grass track race meetings." There are set out the numbers of those who attended on the 4 days in 1938. There was a charge for admission. G The money which was taken in gate money was a considerable sum, no doubt—namely, £356 after allowance is made for tax. The club further received certain money, which was expended in prize money and expenses. So far as the track used by the petitioners is concerned, the case finds: H

> . . . that it was marked out by means of fencing, which was put up and taken down by the said Atkins, some assistance being given by some members of the club.

The position of the track was not always the same, but it was moved slightly at the four different meetings.

> The club paid to Atkins for the use of the field (including the erection and removal

of fences and any necessary cleaning and tidying of the field, and repairs to fences and an occupation road) the sum of 10*s.* per 100 spectators.

In 1938, the sum so paid was £42 14*s.*

In that state of facts, it was contended on behalf of the appellants before the court of quarter sessions that the field " was occupied and used A as a race-course," that it " was not land used as pasture ground only," that it " was not agricultural land within the meaning of " the Act, and that it " was a separately rateable hereditament." On the other hand, the respondents contended that the field was not separately rateable, that it was " land used as pasture land only within the meaning B of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2)," and that the " field was not land used as a race-course within the meaning of sect. 2 (2) " of that statute. The court of quarter sessions accepted the contention of the appellants and allowed the appeal, and the matter was remitted to the respondents to determine the gross and rateable C value of the hereditament. The question for this court is whether, on the facts proved or admitted, the court of quarter sessions arrived at a correct decision in point of law.

It has been alleged by counsel for the respondents to this appeal that the question of substance in the court below, and in this court D also, is a question, not of law, but of fact, and that, as the court of quarter sessions arrived at a particular decision on the facts, this court ought not to, and indeed cannot in law, disturb it. In my opinion, that is too superficial a view of the question involved. The Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), provides a definition E of what are termed agricultural hereditaments. " Agricultural land " is there said to mean :

. . . any land used as arable meadow or pasture ground only . . .

Then certain other words follow, but the section proceeds :

F . . . does not include land occupied . . . or preserved mainly or exclusively for purposes of sport or recreation, or land used as a race-course . . .

The question which the court of quarter sessions had to decide here was whether or not, within the meaning of that definition, it was true to say that this particular land was land used as a race-course. I do not G think that those words can fairly be interpreted as meaning that the land is taken out of the general provisions with regard to agricultural land if it is on particular and comparatively rare occasions used for the purposes of a race-course.

We have been asked by counsel for the appellants to hold that the H words " land used as a race-course " must be construed as meaning land used as a race-course in the sense of a race-course for horse-racing. I think that that is too narrow a view. I cannot accept the argument that, because the racing which was done here was racing by means of motor cycles, that therefore the land could not possibly be described as " land used as a race-course." I think that we must look at the facts fairly and fully in order to ascertain what is the true inference to be drawn from those facts. The assessment committee, as appears by one of the documents annexed to this case, came to the conclusion that the assessment proposed had to be cancelled because, in their view:

> . . . the very occasional user for the purpose of motor-cycle racing is not sufficient to take the hereditament out of the category of agricultural land as defined by the A
> Act.

One notes the words: "the very occasional user."

What is the true view of the use of this land? In my opinion, the facts stated in the case supply an unambiguous answer to that question. The land was part of "a certain farm known as the Home Farm in . . . B
Corfe Mullen" containing 11 fields, and the particular field, the one field which was chosen for the purposes of assessment, "was at all material times used for the purposes of pasturing cattle in connection with the farmer's business as a farmer" at the Home Farm. Moreover, the user, the very occasional user, of that particular field for the purposes C
of motor-cycle racing is expressly found to be such as "not substantially to affect the use of the field as pasture land in connection with the Home Farm." I think that it is apparent, therefore, on the face of this case, that the real, substantial and normal user of this field, in common with the other 10 fields which made up the farm, was for the pasturing of D
cattle and the business of a farm. That was the real and substantial use. Is it right to take the occasional and exceptional use as something which denotes and describes the true use of this land? It seems to me erroneous to make use of the definition in that sense. It is not true, I think, to say that, when this subsection is correctly interpreted, E
this land was land used as a race-course merely because it was very occasionally used in the manner described in the case.

Reference has been made to a case which was before this court in Oct., 1938—namely, *Jarvis* v. *Cambridgeshire Rural Assessment Area Assessment Committee* (1). It is quite true that the facts in that case are not quite F
the same as the facts in this case, but it is not easy to find cases which precisely correspond in all respects, and I think that in substance the point which was raised in that case was the same as the point which is raised here. The conclusion at which we arrived was that the hereditament in that case was an agricultural hereditament, and was occupied G
as an agricultural hereditament. In that case, reference was made, as also has been made to-day, to a case which came before Lord Warrington of Clyffe and his colleagues at quarter sessions, *Tattersall* v. *Marlborough Area Assessment Committee* (2), as to which we have had the advantage to-day, as we had then, of hearing read the words of H
Lord Warrington of Clyffe. They seem to me to deal with this very point. As we accepted that opinion as throwing light upon the matter in Oct., 1938, so also we accept it to-day as throwing light upon the matter. I think that, when this section is rightly construed in relation to the proved and admitted facts of this case, the true conclusion here

was that this hereditament was an agricultural hereditament. That being so, the other question, which is not expressly raised, but which is involved by the statement of the case—namely, whether or not this particular field ought to be rated separately—does not really arise. In my opinion, with all due respect to the court of quarter sessions, the decision at which they arrived was not a correct decision, and I think, therefore, that this appeal ought to be allowed.

HILBERY, J. : I agree.

HALLETT, J. : I agree.

Appeal allowed with costs.

Solicitors : *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the appellants) ; *Peacock & Goddard*, agents for *Luff*, *Raymond & Williams*, Wimborne Minster (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ETTENFIELD *v.* ETTENFIELD.

[COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **January 15, 16, 23, 1940.**]

Bastardy—Presumption of legitimacy—Separation deed—Evidence of non-access—Admissibility.

The respondent having left his wife in Aug., 1935, a separation agreement was arrived at between them in Sept., 1935. The terms of this agreement were set out in correspondence between solicitors acting for the two parties, and were consistently observed by both parties. The parties continued to live in the same town, but rarely met. While they were so separated, the wife on May 26, 1937, gave birth to a child. The wife asserted that marital relations had been resumed in Aug., 1936, but this was denied by the husband. The question thus arose whether or not, in these circumstances, the husband could in law adduce evidence of non-access :—

HELD : (i) the rule that evidence tending to bastardise or legitimise a child conceived and born during wedlock cannot be given by either spouse is absolute, and applies, not only when the parties are living together, but also when they are living apart, either under an order of the court or by their own volition.

(ii) where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, if the parties have been separated by an order of a competent court, the husband need prove no more than the date of the decree or order, and the date of birth of the child. If the child must have been conceived after the date of the decree or order, there is a presumption that it is a bastard. The wife may rebut this presumption if she can, but she must do so by evidence other than her own.

(iii) where the only evidence is the birth of a child to the wife, and the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give, evidence in support of the child's legitimacy.

Mart v. *Mart* (3) and *Stafford* v. *Kidd* (5) *overruled.*

Decision of Langton, J. ([1939] 2 All E.R. 743) *reversed.*

[**EDITORIAL NOTE.** The tendency in the Divorce Court has been to mitigate the hardship caused by the rule in *Russell* v. *Russell* (1). The Court of Appeal, however, have felt that this tendency is contrary to the opinions given in the House of Lords in that case and that the rule must be applied with more strictness. This view was taken by Luxmoore, J. (as he then was), in *Re Bromage, Public Trustee* v. *Cuthbert* (6), and that decision is here approved by the Court of Appeal. The point at issue is whether the rule is applicable when the parties are living apart from one another. It will be remembered that the decision in *Russell* v. *Russell* (1) was a majority decision, Lord Sumner and Lord Carson dissenting. Lord Sumner's closely reasoned dissenting opinion will presumably be the subject of discussion if the present case is taken to the House of Lords pursuant to the leave given by the Court of Appeal.

As to the Rule in *Russell* v. *Russell*, see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para. 772; and for Cases, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97.]

Cases referred to:

(1) *Russell* v. *Russell*, [1924] A.C. 687; Digest Supp.; 93 L.J.P. 97; 131 L.T. 482.
(2) *Warren* v. *Warren*, [1925] P. 107; Digest Supp.; 94 L.J.P. 68; 133 L.T. 352.
(3) *Mart* v. *Mart*, [1926] P. 24; Digest Supp.; 95 L.J.P. 29; 134 L.T. 446.
(4) *Hetherington* v. *Hetherington* (1887), 12 P.D. 112; 3 Digest 366, *71*; 56 L.J.P. 78; 57 L.T. 533.
(5) *Stafford* v. *Kidd*, [1937] 1 K.B. 395; [1936] 3 All E.R. 1023; Digest Supp.; 106 L.J.K.B. 193; 156 L.T. 75.
(6) *Re Bromage, Public Trustee* v. *Cuthbert*, [1935] Ch. 605; Digest Supp.; 104 L.J.Ch. 299; 153 L.T. 313.
(7) *St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (1706), 1 Salk. 123; 3 Digest 360, *20*.
(8) *Goodright d. Stevens* v. *Moss* (1777), 2 Cowp. 591; 3 Digest 365, *58*.
(9) *R.* v. *Murrey* (1704), 1 Salk. 122; 3 Digest 361, *31*.
(10) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; 3 Digest 363, *49*.
(11) *Banbury Peerage Case* (1811), 1 Sim. & St. 153; 3 Digest 364, *54*.
(12) *Hospall* v. *Collins*, *sub nom. Dickens* v. *Collins*, unreported, cited in *Banbury Peerage Case*, reported in Nicolas on Adulterine Bastardy at p. 521. A full discussion of the case of *Hospall* v. *Collins* is in the same work at pp. 122-126.
(13) *R.* v. *Sourton* (*Inhabitants*) (1836), 5 Ad. & El. 180; 3 Digest 365, *60*; 5 L.J.M.C. 100.
(14) *The Aylesford Peerage* (1885), 11 App. Cas. 1; 3 Digest 367, *80*.
(15) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; 42 Digest 979, *95*.
(16) *R.* v. *Kea* (*Inhabitants*) (1809), 11 East, 132; 3 Digest 365, *63*.
(17) *The Poulett Peerage*, [1903] A.C. 395; 3 Digest 366, *76*; 72 L.J.K.B. 924.

Appeal by a wife from a judgment of Langton, J., dated May 10, 1939, in favour of the husband cross-petitioner, and reported [1939] 2 All E.R. 743. Langton, J., held that, in spite of the rule in *Russell* v. *Russell* (1), the husband might give evidence of non-access, because the parties were living apart under an informal agreement. The wife appealed. The facts are fully set out in the judgment of the court delivered by Goddard, L.J.

J. B. Latey for the appellant.

D. M. Goodbody for the respondent.

Latey: The judge was wrong in holding that, in these circumstances, the petitioner could give evidence of non-access. *Mart* v. *Mart* (3), in which the court held that such evidence is admissible when a separation deed is subsisting, was wrongly decided. In *Re Bromage, Public Trustee* v. *Cuthbert* (6), Luxmoore, J., rightly held that, in spite of a separation deed, the presumption of legitimacy arises. The Divisional Court of King's Bench Division were wrong when, in *Stafford* v. *Kidd* (5), they preferred the decision in *Mart* v. *Mart* (3) to that in *Re Bromage, Public Trustee* v. *Cuthbert* (6). Langton, J., held that he was bound by the decision of the Divisional Court in *Stafford* v. *Kidd* (5), but, as a judge of the High Court, he was not so bound, and was entitled to consider the whole question *de novo*. For over 150 years, in legitimacy cases, the court has presumed the legitimacy of any child born of a married woman, except where the marriage was subject to a decree of divorce *a mensa et thoro*, a decree of judicial separation, or a separation order under the Summary Jurisdiction Acts. The presumption has been variously called the presumption of legitimacy, the presumption of access, or the presumption of intercourse. In such cases, the rule of evidence has been that a spouse may not give evidence to bastardise a child born in wedlock except, perhaps, where there has been a divorce *a mensa et thoro*, a judicial separation, or a separation order. The *ratio decidendi* in *Mart* v. *Mart* (3) and *Stafford* v. *Kidd* (5) was simply that the presumption was rebutted by the execution and subsistence of the separation deed. That is to say, the principle of law appertaining to the pronouncement of a divorce *a mensa et thoro* applied equally to the execution of a deed of separation. Although, before the decision in *Russell's* case (1), the court had always recognised that neither the rule nor the presumption applied when there was a judicial separation or a separation order, it was held in *Morris* v. *Davies* (10) and *The Aylesford Peerage* (14)—cases of the highest authority—that both the rule and the presumption apply when the spouses are living apart under a deed of separation. In *Russell* v. *Russell* (1), the House of Lords held that the same absolute rule—not another rule of limited application—applies to cases in which the issue is adultery, and only indirectly legitimacy: *semble, per* Viscount Finlay, the presumption and the rule are to some extent interdependent. Their Lordships approved *Morris's* case (10) and *The Aylesford Peerage* (14). In *Mart's* case (3) and *Stafford's* case (5), the rule was held not to apply, on the ground that a deed of separation had the same effect as a decree of judicial separation in rebutting the presumption. In *Re Bromage, Public Trustee* v. *Cuthbert* (6), Luxmoore, J., rightly followed *Morris's* case (10) and *The Aylesford Peerage* (14), and held that the presumption was not rebutted, and, by clear implication, that the spouses' evidence of non-access could not be admitted. In the present case, Langton, J., held himself bound by *Mart's* case (3) and *Stafford's* case (5), and was, therefore, concerned to decide only whether there could be a distinction between a formal and an informal agreement. In referring to a prior invasion of the sanctity of the conjugal relation as the basis for an exception to the rule, he misconstrues the effect of the authorities. The rule is as old as the common law, and is absolute: *Goodright d. Stevens* v. *Moss* (8), *R.* v. *Kea* (*Inhabitants*) (16), *R.* v. *Sourton* (*Inhabitants*) (13), *Banbury Peerage Case* (11), and *The Poulett Peerage* (17). The presumption and the rule do not apply after a divorce—*St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (7)—or a decree of judicial separation. In *Hetherington* v. *Hetherington* (4), Sir James Hannen, P., held that a separation order reversed the presumption of access and legitimacy, and that evidence of non-access could be given by a spouse, for the rule of evidence depends on the presumption. He said that, in refusing to act on the evidence of the parties, the magistrates were under the impression that the issue was one of bastardy, whereas it was actually one of adultery. He implied that, if the rule in bastardy cases had been applicable, the magistrates might have rightly excluded the husband's evidence. However, by *Russell's* case (1), the rule is identical in bastardy and in adultery cases. It is doubtful whether *Hetherington's* case (4) is now good law. A separation agreement does not end the matrimonial relation, nor make the wife for any purpose a *feme sole*, as does a decree of divorce or of judicial separation. The presumption exists and the rule applies even if the parties are living apart under a deed of separation: *Morris* v. *Davies* (10) and *The Aylesford Peerage* (14).

Goodbody: When the spouses are living apart, the considerations which apply are different from those which are applicable when they are living together. The rule does not then apply, whatever the ground of their separation. In *Russell* v. *Russell* (1), the question of what the position would be under a deed of separation was never raised. By *St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (7), where the parties are living apart under a deed of separation and a child is born, the law presumes that the child is illegitimate. If they are living apart under an informal agreement, the presumption should be the same.

Latey, in reply: Neither *St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (7) nor *Hetherington's* case (4) is any authority for any exception to the rule in *Russell* v. *Russell* (1). In the latter case, Sir James Hannen, P., was concerned only with the presumption of legitimacy, and only his *dicta* on the presumption were approved by Viscount Finlay in *Russell's* case (1).

Goddard, L.J. [delivering the judgment of the court]: In 1924, the House of Lords decided in *Russell* v. *Russell* (1) that the rule long established in legitimacy cases—namely, that neither spouse could be

allowed to give evidence as to the paternity of a child born during wedlock—applied also in divorce proceedings. This decision had a profound and far-reaching effect on the conduct of divorce cases. Those who remember the great number of undefended petitions which followed the end of the last war will recall how common it was for a petitioning
A husband, who in so many cases had been a serving soldier, after proving his marriage, to be asked no more than: "When did you last have intercourse with your wife?" When he had given the date, proof was given that the wife had given birth to a child the conception of which must have taken place at a date later than that given by the husband,
B and a decree followed. After the *Russell* case (1), this simple proof could no longer be accepted, and it is perhaps not surprising that the ingenuity of practitioners endeavoured to find distinctions, or ways by which the rigour of this rule could be mitigated. *Warren* v. *Warren* (2) is an early example, but we need say nothing about that case, because
C it does not come into question here. Nor do we desire to throw any doubt on that decision. In 1926 *Mart* v. *Mart* (3) came before BATESON, J. Founding his judgment upon *Hetherington* v. *Hetherington* (4), he decided that, where parties are living apart under a deed of separation, the presumption of access is rebutted, as it is where
D the parties are separated by a decree of the court, and he therefore held that the evidence of the spouses as to access or non-access, which was excluded by the *Russell* case (1), could in these circumstances be received. This decision has been uniformly followed in the Divorce Division. It has been approved by the King's Bench Division in *Stafford* v. *Kidd* (5),
E and the only challenge to its correctness, other than in the present case, is to be found in *Re Bromage, Public Trustee* v. *Cuthbert* (6), where LUXMOORE, J., declined to follow it, considering that it was in conflict with two decisions of the House of Lords. It is to be observed that neither BATESON, J., nor the Divisional Court appear to have had their
F attention called to *St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (7), which formed the foundation of the judgment of SIR JAMES HANNEN, P., in *Hetherington* v. *Hetherington* (4). We have now to determine whether *Mart* v. *Mart* (3) was rightly decided.

In the present case, all that need be said as to the facts is that LANGTON, J.,
G has found that the husband left his wife about Aug. 6, 1935. There was no deed or written agreement, but the parties in the following month orally agreed to live apart, the husband making a weekly payment to his wife, and both parties have observed and acted upon this agreement ever since. Whilst so living apart, the wife gave birth to a child on
H May 26, 1937. Having found that there was this agreement, the judge was of opinion—and, so far, we agree with him—that, for the purpose of considering whether or not the husband could give evidence of non-access, there was no difference between a separation by deed and one by any other form of agreement. Accordingly, holding that he was bound by the decision of the Divisional Court in *Stafford* v. *Kidd* (5), he admitted

the evidence of both the husband and the wife on the question of access, and, preferring that of the husband, granted him a decree. Except for the husband's evidence that he had not had intercourse with his wife since the separation, there was no evidence whatever against the wife.

The rule as laid down by the House of Lords in *Russell's* case (1) is in the widest possible terms. It applies to all cases, of whatever nature, where the paternity of a child is in question. As the EARL OF BIRKENHEAD put it, at p. 698 :

> The rule as laid down is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no geographical qualification.

Accordingly, if the husband goes to the other side of the world, on a business visit extending over a period of a year or more, and 12 months after his departure his wife gives birth to a child, nevertheless he cannot give evidence of non-access. If the birth is the only evidence of adultery, his absence must be proved by other evidence. It would indeed be a strange result if, merely because the parties agreed to a separation, intending it to be permanent, but continued to live, as in this case, a few minutes' walk from each other, they were able to give evidence, the one denying and the other asserting access, merely because of this agreement to separate. It is said, however, that there has always been an exception to the rule—namely, that, where the parties are separated by the sentence of the court, their evidence on this matter is admissible—and, admitting that exception, it is contended that there can be no sound reason for treating a separation by consent in any way differently from a separation by the court. If it were true that there was this exception, the corollary might well follow, and this is what is at the root of the judgment of BATESON, J., in *Mart* v. *Mart* (3). Apart, however, from the fact that the House of Lords said in *Russell* v. *Russell* (1) that the rule is absolutely general in its comprehensiveness, thereby admitting of no exception, when one examines the cases which are supposed to support the view of an exception, it will be found that they are not authority for any such proposition. SIR JAMES HANNEN, P., founded his opinion in *Hetherington* v. *Hetherington* (4) on *St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (7). This case was decided in 1706, when LORD HOLT presided in the King's Bench, so it had been law for some 70 years before LORD MANSFIELD decided *Goodright d. Stevens* v. *Moss* (8), so often referred to with approval in *Russell's* case (1). *Hetherington's* case (4) decided that, where spouses are separated by sentence of divorce *a mensa et thoro*, children born to the woman during the separation are presumed to be bastards, but that, if the parties separate without a sentence—that is, voluntarily—the presumption is that the children are legitimate until the contrary is proved. There is not a word in this case to suggest that the spouses were competent witnesses either to prove or to disprove legitimacy. It deals solely with the *presumptio juris* that arises (i) where parties are separated by the court, and (ii) where the separation is voluntary. It does show that, contrary to what we think must have been the opinion of BATESON, J., there is a difference for this purpose between a decree and a deed of separation, but it has nothing to do with the competency of the spouses to give evidence.

Reference may also be made to *R.* v. *Murrey* (9), where it was said that, if the husband was out of the four seas during all the time of the wife's going with child, the child was a bastard, but, if he were at all here within the time, it was legitimate, and no bastard, clearly showing that this is what the law presumes. Again, however, it is no authority for saying that the spouses can testify on the subject. In a note to this case, it is said, and repeated in the House of Lords in *Morris* v. *Davies* (10), that the doctrine concerning the four seas is now exploded, and that this might be somewhat misleading. It is more accurate, we think, to say that what is exploded is the idea that, if the husband were ever within the four seas, the child could not be found to be a bastard. This appears most clearly in the opinion of LORD ELDON in the *Banbury Peerage Case* (11), and it is of interest to note that LORD ELDON referred to the same decision of HALE, C.J., as did LORD HOLT in *St. George's* v. *St. Margaret's, Westminster* (*Parishes of*) (7), though under the name of *Hospall* v. *Collins* (12) and not *Dickens* v. *Collins* (12). No report of this case can be found, and it is due to the researches of Mr. Riches, the librarian of the Bar Library, that we have been able to find the reference to it in the opinion of LORD ELDON. Evidence to establish the bastardy can be called, as was done in *Morris* v. *Davies* (10), but this does not mean that it can be that of either spouse. The view that these cases deal with presumptions, and with presumptions only, is supported by the observations of VISCOUNT FINLAY on *Hetherington* v. *Hetherington* (4) in the *Russell* case (1), at p. 717, where he also points out that *Hetherington* v. *Hetherington* (4) affords no support for the admission of this evidence. SIR JAMES HANNEN, P., was only repeating what had been said by LORD HOLT as to the presumption which arises where there has been a sentence of the court, and which does not otherwise obtain. To the same effect is *R.* v. *Sourton* (*Inhabitants*) (13). There it was sought to prove that a female pauper was illegitimate, and the mother's husband was called to prove that 5 years before the birth he had left his wife and ever since had lived 100 miles away with another woman, his wife's sister, by whom he had had a family. The chances, therefore, that he could have been the father of the pauper were non-existent, but, nevertheless, the court held, not only that he could not give evidence as to non-access, but also that he could not even be examined as to any collateral fact—for example, that he had been living 100 miles away with a paramour—as tending to prove non-access. Then there comes *The Aylesford Peerage* (14). That case was before the Committee of Privileges, but, as the various *dicta* of the members of the committee were approved in *Russell* v. *Russell* (1), they are now to be regarded as authoritative in this court. In that case, the Dowager Lady Aylesford, as guardian of her infant son, claimed that he was the son of her late husband, the seventh Earl, and entitled to succeed to the dignity. Lord and Lady Aylesford had separated in 1876. A deed of separation was executed in 1877, and a child was born in 1881. All their Lordships were of opinion that neither Lady Aylesford nor, had he been living, Lord Aylesford could have been called to prove who was the real father of the child. That case appears to us to be conclusive of the matter, and we find some difficulty in understanding what view Bateson, J., took of it. He said, quite correctly, that the committee decided that evidence of the conduct of the spouses was admissible as part of the *res gestæ*, but not as direct evidence of the fact. He does not deal anywhere, however, with the emphatic expressions of opinion, more especially that of Lord Bramwell, that the spouses could not testify although they were separated.

It remains to deal with *Stafford* v. *Kidd* (5), and it is important to understand exactly what questions the court there had to decide. It was a case stated by magistrates arising out of a bastardy summons. The complainant was a married woman, and was separated from her husband, but not under an order of any court. Unless, therefore, she could prove non-access by her husband, it was argued, and the justices agreed, that she must fail. Some independent evidence of non-access was given, but this did not satisfy the justices. They accordingly held that evidence of non-access was a condition precedent to the appellant's proceeding with the case, and on all hands this was agreed to be right. They also held that a deed of separation had not the same effect as a decree of judicial separation, or a separation order, in rebutting the presumption of access and legitimacy. For the reasons we have already given, we think that on this point also the justices were right. The justices then went on to hold that, as there was no judicial separation, the appellant was bound by the rule in *Russell's* case (1), and could not herself give evidence bastardising the child. In our opinion, they were right in holding that she could not give evidence, but they were wrong in thinking that the disability arose from the fact that she was not separated from her husband by an order of court. The disability arose from the rule of law, which applies whether or not she be separated by an order of court. The Divisional Court, following *Mart* v. *Mart* (3), held that a separation deed had the same effect as a judicial separation. It is perhaps unfortunate that *St. George's* v. *St. Margaret's, Westminster (Parishes of)* (7) was not brought to their attention, as, if it had been, they might well have come to a different conclusion. They also held, however, as Lord Hewart, L.C.J., put it, that the appellant was released from the fetters of *Russell's* case (1), and in this view we respectfully differ, for reasons already given. However, we do not understand why it is said that *The Aylesford Peerage* (14) added anything new to *Morris* v. *Davies* (10), which was one of the cases relied on by Luxmoore, J., in *Re Bromage, Public Trustee* v. *Cuthbert* (6). We have not thought it necessary to deal in detail with *Morris* v. *Davies* (10), because the point

we have here to decide only arose there by inference. The question was as to the legitimacy of the plaintiff, and the House of Lords held that what was called in the case circumstantial evidence was admissible on the subject, notwithstanding that the mother's husband was always in the kingdom. The husband and wife were separated, and what is to be
A observed is that no one suggested that either was a competent witness. In *The Aylesford Peerage* (14), as already pointed out, there was the direct opinion of all the learned Lords that the spouses could not give evidence in spite of their being separated. Then again, both in *The Aylesford Peerage* (14) and in *Russell* v. *Russell* (1), the House held that
B the Matrimonial Causes Act, 1857, which had been in force for many years before the former came before the House, had made no difference to the law. Nor do we understand the exact implication of the passage which says that *Morris* v. *Davies* (10) belongs to a period when divorce alone could get rid of the presumption of legitimacy, and when pro-
C ceedings for judicial separation were unknown. It is perfectly true to say that in those days divorce alone could rebut the presumption, but divorce then was only *a mensa et thoro*, and that was the equivalent of the decree of judicial separation. If authority be needed for this, it is to be found in the opinion of SIR JAMES HANNEN, P., in *Hetherington* v.
D *Hetherington* (4). The question, of course, could not arise where there had been a divorce *a vinculo matrimonii*, or what we should nowadays call a decree of nullity. We are, therefore, unable to agree with either *Mart* v. *Mart* (3) or *Stafford* v. *Kidd* (5), and think that the criticism of the former case by LUXMOORE, J., is sound.

E The result of our examination of the authorities may be summarised as follows. (1) The rule that evidence tending to bastardise or legitimise a child conceived and born during wedlock cannot be given by either spouse is absolute, and applies, not only when the parties are living together, but also when they are separated either by a decree of a court
F of competent jurisdiction or by their own volition. (2) Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, if the parties have been separated by the decree or order of a competent court, the husband need prove no more than the date of the decree or order, and the date of birth of the child. If it must
G have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard. The wife may rebut this presumption if she can, but she must do it by evidence other than her own. (3) Where the only evidence is as mentioned in the last paragraph, and the parties have voluntarily separated, whether by deed, writing under
H hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give, evidence in support of the child's legitimacy.

We are well aware that, in deciding against the reception in cases of divorce of the class of evidence which has been accepted since *Mart* v. *Mart* (3), further—and, in some cases, insuperable—difficulties may be put in the way of petitioners, but rules of law, especially those which admit of no exception, sometimes have that result. It is not always easy to explain the reason for rules which have long formed part of our A law. When, for instance, Lord Kenyon, C.J., laid down dogmatically in *Merryweather* v. *Nixan* (15) that there could be no contribution between joint tortfeasors, he was stating a rule of which, as the report of the Law Revision Committee recommending its abrogation showed, no one knew either the origin or the reason, and its justice was certainly not conspicuous. B The reason given by Lord Holt for a different presumption prevailing, according to whether the parties are judicially or non-judicially separated, may not to some minds appear satisfactory, but there is the rule. If the evidence given in this case be rightly received, it is obvious that a serious inroad has been made on a rule which the C highest court in the kingdom has declared to be without exception. If the rule works hardship, it is for the legislature, and not for the courts, to mitigate its effect. The appeal will be allowed, the decree *nisi* rescinded, and the petition dismissed.

Appeal allowed with costs in both courts. Decree nisi rescinded. Petition D *dismissed. Leave to appeal to the House of Lords.*

Solicitors: *Boxall & Boxall*, agents for *Woosnam & Co.*, Blackpool (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *J. Ogden Hardicker, Hanson & Co.*, Manchester (for the respondent).

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[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS.

F

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.) **December 8, 11, 12, 13, 14, 15, 18, 19, 1939, January 29, 1940.**]

Building Societies—Advances—Security on which advances can be made—Mortgage of freeholds—Collateral charge on fund—"Pooling agreement"—Validity—Injunction—Execution of mortgage—Estoppel—Fraudulent statements by third party—Building Societies Act, 1874 (c. 42), *ss.* 12, 13, 25—*Building Societies Act*, 1894 (c. 47), *ss.* 13 (1), 17. G

The defendant purchased a freehold house from a firm of builders at the price of £730 in respect of which the plaintiffs lent upon mortgage £693. The defendant had in fact been let into possession of the house before the execution of the mortgage. The normal sum which the H plaintiffs could have advanced upon the security of the house was £545, but, as they had a collateral security by way of a charge upon sums of money deposited with them by the builders, they were willing to advance the larger sum. Of the sum of £693, only £650 was paid in respect of the purchase, £6 being retained in respect of costs, and £37 being placed to the deposit fund over which there was a collateral charge. The defendant had, before the purchase, been given a brochure issued by the builders stating that the house would be built under the strictest supervision by the local authority, would be thoroughly inspected by the plaintiffs' surveyors many times during its erection, and would be constructed of exceptionally good materials by excellent workmen. The brochure further stated that a leading building society was lending on mortgage of the houses up to 95 per cent. of the purchase price, and this brochure had been discussed with the defendant in the presence of a representative of the plaintiffs. The defendant contended that the collateral security taken by the plaintiffs rendered the mortgage *ultra vires* the plaintiff society and illegal under the Building Societies Acts and the rules of the plaintiff society, and was, therefore, unenforceable by them, and counterclaimed for damages for fraudulent misrepresentation by oral statements supported by the contents of the brochure :—

HELD : (i) following *Halifax Building Society* v. *Salisbury* (1), the mortgage was, as between the plaintiffs and the defendant, a mortgage of freeholds, and the fact that there was to be a collateral security, which might be unauthorised by the Acts, with another party did not make it unenforceable as between the plaintiffs and the defendant, so long as the security of the freehold estate was not merely nominal. The mortgage was not authorised by the rules of the plaintiff society, but that did not make it unenforceable against the defendant, the rules being mere internal regulations.

(ii) the plaintiffs had made themselves responsible for the statements alleged to be fraudulent, and, as it was also shown that those statements induced the defendant to enter into the transaction, the counterclaim for damages for fraud succeeded.

Decision of BENNETT, J. ([1939] 1 All E.R. 481) *affirmed on the first point and reversed on the second.*

[**EDITORIAL NOTE.** The question of the validity of the mortgage had been decided in the Court of Appeal in the recent appeal in *Halifax Building Society* v. *Salisbury* (1), and on that part the court merely follows the previous decision. That, however, still left the question of the liability of the society for the statements in the puff of the building estate. In this respect, the Court of Appeal have reversed the decision of BENNETT, J., and, while no new principle of law is involved, building societies who finance building estates are made aware of a liability which they have probably ignored in the past.

AS TO STATUTORY REGULATION OF BUILDING SOCIETY MORTGAGES, see HALSBURY, Hailsham Edn., Vol. 3, pp. 410, 411, paras. 775-777 ; and FOR CASES, see DIGEST, Vol. 7, pp. 472, 473, Nos. 112-116.]

Cases referred to :

(1) *Halifax Building Society* v. *Salisbury*, [1939] 4 All E.R. 427 ; Digest Supp.

(2) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327 ; 9 Digest 615, *4094* ; 25 L.J.Q.B. 317.

(3) *Fountaine* v. *Carmarthen Ry. Co.* (1868), L.R. 5 Eq. 316 ; 10 Digest 1178, *8361* ; 37 L.J.Ch. 429.

(4) *Re Hampshire Land Co.*, [1896] 2 Ch. 743 ; 9 Digest 645, *4267* ; 75 L.T. 181 ; *sub nom. Re Hampshire Land Co., Ltd., Ex p. Portsea Island Building Society*, 65 L.J.Ch. 860.

(5) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25 ; 17 Digest 83, *29* ; 42 L.T. 334.

(6) *Smith* v. *Streatfeild*, [1913] 3 K.B. 764 ; 42 Digest 976, *65* ; 82 L.J.K.B. 1237 ; 109 L.T. 173.

APPEAL by the defendant from a judgment of BENNETT, J., dated

Feb. 13, 1939, and reported [1939] 1 All E.R. 481. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J.

A. S. Comyns Carr, K.C., and *C. H. A. Lewes* for the appellant.

R. F. Roxburgh, K.C., and *M. G. Hewins* for the respondents.

Comyns Carr, K.C. : It was found by BENNETT, J., that the appellant had been the victim of a fraud. He held, however, that the society was not responsible for it, in the circumstances. With regard to the fraudulent misrepresentation, and to the question as to whether or not the society is responsible for such misrepresentation, one Feldmar was present at the interview as secretary to Morrells, and he was also managing clerk to the solicitors. The effect of the correspondence is to make the building society responsible for the persons whom Feldmar might introduce. If the onus was upon them to disprove that Feldmar was an agent, they have not disproved it. The building society did not take steps to verify the statements in the brochure as to the quality of the house. The representation as to the good workmanship and the materials of the house was untrue. The building society either knew the statement to be untrue or were reckless as to whether or not it was true. The purpose of putting in the brochure the statement about the building society, is so that there may be put forward to intending purchasers the truth of the statements about the quality of the house. The building society have supported the statement of the builders that the house was worth the amount advanced upon it. The true view of the correspondence about the brochure is that the building society authorised the representation as set out in the brochure. Also, there was evidence that the statements were made orally by two persons. One of these persons was Feldmar and the other was someone introduced as an agent of the society. It is fairly incidental to the society's business to advertise the facilities it offers. The brochure issued is an advertisement of the society as well as of Morrells. Some of the representations are matters which would be within the knowledge of the building society, while some of them would not be within the knowledge of the building society. Where two people are acting together in a joint operation, the knowledge of one is the knowledge of both : *Smith* v. *Streatfeild* (6).

Roxburgh, K.C. : With regard to the question of fraudulent misrepresentation, there are four matters for consideration. The first two are whether or not there was a fraudulent misrepresentation and whether or not the appellant has suffered injury in consequence. Both these points must be proved. The other two matters are the amount of damages and the result of the judgment in considering the bearing of the law upon the issues involved. It is an unusual situation for any one to say that he has been induced to enter into a contract with one of two joint tortfeasors. It is uncommon to find that the claimant has been induced to enter into a contract with one of the tortfeasors. The appellant says that she has allowed the house to be charged with a larger sum than she would have allowed to have been charged upon it if she had known the true facts. The appellant has suffered no damage by reason of her having been induced to execute the mortgage. The damage must flow from her having paid something. The appellant has had the use and occupation of the house, and this must be taken into account, as well as the amount she paid.

A *Lewes* in reply.

CLAUSON, L.J. [delivering the judgment of the court]: In this case, the plaintiffs are a building society, and they claimed in the action possession of a house at Kingsway, West Wickham, in the county of B Kent, which they alleged that the defendant had mortgaged to them by a deed dated Oct. 10, 1934. By her defence, the defendant set up the case that, although she had executed a deed of mortgage of the house in the terms alleged by the plaintiff society, she had executed it as an escrow upon a condition, known to the plaintiffs, and noted on the deed C as executed, that it should be delivered to them only if certain defects in the house were made good—a condition which, as she contended, and as the judge held, had not been fulfilled. There were certain alternative defences addressed to the contingency of the mortgage being established by the plaintiffs as a valid and effectual mortgage. The counterclaim D asked for a declaration that the house was not charged to the plaintiffs, that declaration being sought, not only on the footing that the mortgage had never become an effective instrument, but also on the ground that the mortgage was beyond the powers of the society. By way of consequential relief, the counterclaim further asked for repayment of E £121 16*s*., being certain moneys paid by the defendant to the plaintiff society in respect of the moneys intended or proposed to be secured by the mortgage. The counterclaim further asked for £500 damages for fraud.

At the hearing before BENNETT, J., the defendant conducted her case F in person, and was (no doubt quite properly) allowed considerable latitude. She was not confined strictly to her pleadings. In this court, the pleadings were amended by order of the court, so as to raise certain contentions which were discussed before BENNETT, J., and, though not specifically dealt with by him in his judgment, took on an aspect of G importance during the arguments in this court. These amendments related to the counterclaim for damages for fraud.

In view of the fact that there is no appeal against the dismissal of the action, the facts, which were necessarily stated in great detail in the very careful judgment of the judge, may be summarised with comparative H brevity. Early in 1934, Morrell (Builders), Ltd. (to whom it will be convenient to refer as Morrells), were developing a building estate known as the Coneyhall Estate at West Wickham in Kent. The defendant wished to buy a house, and with her husband visited the estate with that object on Feb. 1, 1934, and again on Feb. 9, 1934. They viewed the house to which the action relates, and were supplied by

Morrells with a copy of a pamphlet which, before this court, has been conveniently referred to as "the brochure." There was considerable discussion between the defendant and Morrells' representatives as to a number of statements in the brochure, and in particular in regard to the following paragraph :

> Morrell (Builders), Ltd., are the only builders in Great Britain who can offer, by special arrangement with a leading building society, a 95 per cent. mortgage advance over a period of 24 years at 5 per cent. interest. This proves without a shadow of doubt the amazing value of Morrells' houses.

The judge has found—in our judgment, with complete justification—that this passage in the brochure led the defendant to believe that the house which she was asked to acquire was exceptionally well-built, and that this representation was false, and was known to Morrells to be false. Further, the representation meant, in our opinion, that the value of the house was such that by itself it afforded a security which would be accepted by a prudent lender—namely, the building society concerned—for a loan equal to 95 per cent. of the purchase price asked, and that, accordingly, the house was worth at least the purchase price asked. At the trial, it was suggested that a representative of the plaintiffs was present at the interview of Feb. 9, and was party to this fraudulent representation. This suggestion, however, was not proved.

Induced by these (among other) representations, on Feb. 9 the defendant entered into two contracts. One was for the purchase from Morrells for £100 of the land on which the house now in question was being erected. The second was for the erection and completion of a house for her on the plot by Morrells for £590. It was a term of the contract that, as security for the £590, the defendant should deposit with Morrells a conveyance of the house and a memorandum of charge. The defendant had a certain amount of money available towards the purchase price, which was, as appears above, in substance £690. She could not complete the transaction, however, without an advance, and for this purpose she applied to the plaintiffs for a loan. For the purposes of this loan, the plaintiffs procured a valuation from their surveyors, who are said to have put the value of the house and land at £690. No evidence was called to justify this valuation. It was arranged that a garage should be built at a cost of £40, and the price thus became £730. On this footing, Morrells' solicitors on her behalf asked the plaintiffs to advance £693 to the defendant. On Mar. 3, 1934, the defendant paid Morrells £33 on account of the purchase price, having previously paid a preliminary deposit of £1, and Morrells at once gave her possession of the house, in which she and her husband have lived ever since.

Through April, May and June, nothing further seems to have occurred, save that defects in the house became obvious. In June, the garage was nearly finished, and the plaintiffs' surveyors inspected the house and garage with a view to certifying, as they are in fact said to have done, that the total property was worth the total price of £730. No evidence was given to justify this valuation. It appears from a letter written to the plaintiffs by their surveyors that it was understood that Morrells would rectify the defects which had appeared in the house.

In July, 1934, the position was as follows. The defendant had paid a total of £34 on account of her liabilities to Morrells under the two contracts. She was in possession of the house, in which there were certain defects. She had not obtained a conveyance of the plot, though apparently Morrells had executed the form of conveyance. Therefore, she had not, of course, deposited the conveyance with Morrells, nor had she given them a memorandum of charge to secure her liability for the cost of building the house. It was apparently in contemplation that the transaction should be carried out *uno ictu* by the completion of the conveyance to her, the completion of a mortgage by her to the society, and the advance to her by the society of a sum of £693, which, with a trifling difference, would make up the sum required to enable her to discharge, as she would thereupon do, her liability to Morrells for the balance of the purchase price of the plot and the cost of building the house and garage.

As to what in fact occurred in regard to the contemplated completion, there was the most acute conflict of evidence before the judge. The facts as he found them are most carefully and completely stated in his judgment. As there is no appeal from his judgment dismissing the action, it is unnecessary to restate his findings at length. It is sufficient to state how matters stood on Oct. 10, 1934. At that date, the plaintiffs had in their hands the document D 5, being a mortgage of the house and land by the defendant to the plaintiffs to secure £693. This document presents the appearance of having been duly executed by the defendant, and there is no note upon it suggesting any merely conditional execution. The plaintiffs also had in their hands the conveyance from Morrells to the defendant. They had paid £650 on the defendant's account to Morrells, and themselves retained £43, partly for costs and partly to meet a contribution which, as between themselves and Morrells, was due to be paid to the pooling fund, which was an additional security provided by Morrells to them, and to which reference is made later in this judgment. The plaintiffs had thus cleared off all liability of the defendant to Morrells, on the footing of becoming creditors of the defendant for £693, the figure named in D 5. There is a slight discrepancy of £3 on the figures, but it is not suggested that Morrells, after these payments, had any further claim against the defendant, and it must be taken that all the defendant's liabilities to Morrells had thus been satisfied. Morrells had given the defendant an undertaking in writing to make good the defects in the house. The defendant was in possession of the house.

The judge held that the plaintiffs had failed to prove that the document D 5, on which they based their claim, set up in the action, to recover possession of the house, was signed by the defendant, and he therefore held that their action must be dismissed. From this decision there is no appeal. Incidentally, he held that the house, so far from being particularly well-built, was badly built, and it must be taken that the house was accordingly of less value than the £730 paid for it, especially as certain defects, which had not been remedied, had already appeared.

Before considering the counterclaim, it is necessary to make special mention of one ground of defence set up by the defendant in answer to the claim for possession. The defendant set up the case that, if one assumes the mortgage to be a duly executed and otherwise effective document, the transaction between her and the plaintiffs was invalid by reason of the fact that, according to the constitution of the plaintiffs, it was *ultra vires* for them to advance money otherwise than on the security of a mortgage of real property. It appeared that the advance was not made on the security of real property alone, but was made on a composite security consisting of the mortgage of the house supported by way of collateral security by a charge given by Morrells upon a personalty fund provided with a view to securing the plaintiffs against losses upon advances made to purchasers from Morrells. This matter was elaborately argued before BENNETT, J., and he held, after an exhaustive consideration of the Building Societies Acts, and of various authorities, that the mortgage, had it been established by the plaintiffs, could not have been treated as invalid on the ground of its being *ultra vires*. We do not propose to pursue this topic, for the decision of the judge on this point was fully considered by this court in *Halifax Building Society* v. *Salisbury* (1), and held to be correct. In the present case, it was sought to set up the point that, on the true construction of the rules of the plaintiffs—namely, rr. 36, 37 and 38, as they stood prior to Apr., 1934, and rr. 23 and 24, as they stood after that month—relating to the procedure in regard to advances, it was a condition precedent to any advance being made by the society that the directors should for a *bona fide* opinion that the real property mortgaged to secure the advances was, apart altogether from any collateral security, a sufficient security for the advance. However, as the rules of the Halifax Building Society were in all material respects the same as the plaintiffs' rules in this regard, and as this court decided that the advance in that case was not *ultra vires*, we should feel great difficulty in giving effect to the argument in the present case, even if we agreed with it. In our judgment, however, the contention is unfounded. The rules in question are mere internal regulations, possibly enforceable by the society against its directors, but not having the effect of rendering a transaction which does not comply with them invalid as between the society and those dealing with it, as being outside the scope or the objects of the society. It is unnecessary to do more than refer to *Royal British Bank* v. *Turquand* (2), *Fountaine* v. *Carmarthen Ry. Co.* (3), and, in more recent days, *Re Hampshire Land Co.* (4), as illustrating the distinction between constitutional provisions which limit the scope or objects of the society and mere directory regulations as to internal management or procedure. It was no doubt owing to a correct appreciation of that distinction by counsel in *Halifax*

Building Society v. *Salisbury* (1) that the argument placed before us in the present case was not raised in that case. The new point thus raised cannot, in our judgment, be supported.

We turn now to the counterclaim, which asked in the first place for a declaration that the house was not mortgaged or charged in any way to the plaintiff society, with a consequential claim for delivery up of the mortgage deed referred to in the statement of claim. The judge does not in his judgment specifically deal with these items of the counterclaim, and in the first instance counsel for the appellant sought before us to base her appeal on the ground that this relief should have been granted. In view of the very careful and elaborate discussion of the other far more important points in dispute before him, it is not surprising that the judge does not specifically deal with these items in the counterclaim. It is to be borne in mind that the judge decided specifically that the plaintiffs had failed to establish that the deed which they placed before the court as the mortgage deed had been executed by the defendant, and that on this ground he dismissed the action. The defendant's evidence was that the deed which she had executed (but, according to her evidence, had delivered only in escrow) was another document altogether, though in fact in the same terms, except that it bore a note referring to its incomplete delivery, but no such other document was produced before the court. A declaration of no charge having been effected by the deed propounded but not proved by the plaintiffs would be otiose and irregular. A declaration of no charge having been effected by a deed not placed before the court nor sought to be established by secondary evidence would be impossible, and it would be equally impossible to make a general declaration of no charge. In our judgment, this part of the counterclaim must, in the circumstances, necessarily and obviously fail, and we cannot doubt that the reason why the judge did not specifically deal with the matter was that he assumed—and, in our judgment, rightly assumed—that, in view of his finding, these items of counterclaim had ceased to be effective.

The counterclaim asked in the next place for an injunction to restrain the society (in substance) from making advances supported by a collateral charge on a personalty fund. There was a long argument before us as to whether, in the circumstances, the defendant could be treated as a member of the society, and it is, of course, obvious that such a claim could be set up by her only in the capacity of a member. We have already explained why this court is precluded from deciding the question of *ultra vires* in accordance with the defendant's contention, and it therefore becomes unnecessary to consider whether or not, had this point been open, the defendant would have been in a position to raise it. In our judgment, the judge was correct in refusing to grant the defendant any relief in respect of this head of counterclaim.

The next item of counterclaim is for the return of £121 16*s*. This sum represents payments made by the defendant to the plaintiffs in or towards repayment of the advances made by them, and it falls to be considered in connection with the defendant's succeeding head of counterclaim—namely, for damages—which, in the amended form in which the counterclaim now stands, is a claim for damages for fraud based upon, among other things, the representations in the brochure. The fraud is alleged to have resulted in damage to the defendant by reason of her having entered into the contracts with Morrells, having applied to the plaintiffs for advances, having executed a mortgage to the plaintiffs, and having paid them the £121 16*s*. by way of purported repayments of the advances. It is to be observed that, in the events which happened, and which made *restitutio in integrum* impossible, the defendant does not claim rescission in regard to these various matters. Indeed, Morrells are not parties to the present proceedings, and such a claim could scarcely succeed in their absence. Had rescission been claimed, and claimed successfully, there might have been scope for an order for repayment of this sum of £121 16*s*. as a specific sum, but, in the absence of any right of rescission, counsel for the appellant failed to put forward any legal ground for the return of this money. It was suggested that it might be formulated as a claim for money had and received to the defendant's use, on the ground of mistake or otherwise, but, on examination, it was found impossible to bring the case within any such head of relief, and ultimately, on the pleadings as amended, the sum was claimed as an item relevant on the question of damage, and it is on that view of it that it falls to be treated.

Before the judge, the claim for damages was based on various alleged fraudulent misrepresentations which were suggested to have induced the transactions in question, the most important representation being that contained in the brochure to the effect that the house was particularly well-built and that the plaintiffs were prepared to advance an unusually high proportion of the purchase price for that reason. The pleadings as they stood at the trial below, construed with the particulars, based the case on representations made by a representative of the plaintiffs at the interviews of Feb. 1 and Feb. 9, 1934, already mentioned, and it was sought (but unsuccessfully) to prove that such a representative of the plaintiffs was so present. The judge found that the house, so far from being particularly well-built, was badly built, and there is no question but that the willingness of the plaintiffs to advance an unusually high percentage of the purchase price was due, not to any belief on their part that the houses were particularly well-built, but to the fact that collateral security was provided by the operation of the so-called pooling agreement entered into by them with Morrells. There was present in the case, accordingly, every element which would enable the judge to hold the plaintiffs liable in damages for fraud, if only the one further element were present—namely, evidence that the representations, and in particular the vital representation put forward in the paragraph quoted above from the brochure, were put forward to the plaintiffs' knowledge for the purpose of inducing the defendant to enter into a transaction with Morrells, which would lead to a consequential transaction between the defendant and themselves. The judge considered himself unable to find for the defendant on this part of the case, because the defendant failed to prove that a representative of the plaintiffs was present at the interviews at which the representations were made and the brochure was produced and discussed. He said, at p. 499 :

> In my judgment, however, her case for damages for fraud fails, because she has failed to prove that the plaintiffs were in any way responsible for the representations made to her. It has been proved that no representative of the plaintiffs was present at the interview of Feb. 9, 1934.

After thus dealing with the matter, the judge continues as follows, at p. 499 :

> I confess that I should have been pleased to see a director or manager of the plaintiffs in the witness-box, and to have had a satisfactory explanation of how, if the directors knew of the brochure and of the statements it contained, they continued to have business associations with Morrells. I have read the statement in the brochure with reference to a building society. If the directors of the plaintiffs knew of that statement after Mar. 3, 1934, and thereafter lent money of the plaintiffs to persons who were buying houses from Morrells, I do not understand how they as honest men could have done so without making it clear to the borrower that, so far as the plaintiffs were concerned, the statement was untrue. Mr. Clough [an official of the plaintiffs who gave evidence at the trial] said that he thought that the directors of the plaintiffs knew of the brochure in Mar., 1934. They lent money afterwards. The loan to the defendant was made afterwards. She certainly was never told what the true position was, and, as I say, I should have been glad to have had an explanation from a director of the plaintiffs with regard to it.

In the course of the hearing, the judge had succeeded in securing the disclosure by the plaintiffs for the first time of certain correspondence between the plaintiffs and Morrells in regard to the brochure. We deal with the contents of the correspondence below, but it is convenient to state at once that, having regard to the correspondence, we are satisfied that the judge ought to have held, and that we are bound to hold, for the defendant on this issue of fraud. It is true that at the interviews of Feb. 1 and Feb. 9, at which the crucial misrepresentations were made, they were made by Morrells, and not directly by the plaintiffs, but the plaintiffs associated themselves with the fraud, and are, therefore, responsible for it, for they had knowledge of the false representations, and of their falsity, and they must have known that it was under the influence, and through the inducement, of the false representations that the defendant, having originally entered into the contracts with Morrells, was proceeding to complete those contracts, and, as an integral and indispensable part of that completion, accept the obligations of a borrower towards the plaintiffs. It appears to us to result quite clearly that the plaintiffs thus became liable, as participators in the fraud, for any damage which the defendant had suffered thereby. The pleadings as amended by order of this court cover a claim based on these lines, though the pleadings as they stood at the trial before BENNETT, J., did not. The correspondence, which, in our judgment, establishes a claim on these lines, was certainly discussed before the judge. It is no doubt the fact that in his judgment he does not deal with the claim in the form in which we have stated it. This may have been due to the fact that the pleadings before him did not cover the ground. However, we are satisfied that we have done no injustice to the plaintiffs in allowing the claim to be raised in this form by the pleadings as amended, and we are satisfied that we should be doing an injustice if we did not, after the elaborate arguments on the point before us, allow the defendant to rely on this ground of claim.

Upon a study of the correspondence to which we have referred above, the following facts emerge. In Dec., 1932, Morrells inquired of the plaintiffs on what terms the plaintiffs would make 90 per cent. advances in respect of certain named building estates which were under development by Morrells. The Coneyhall Estate, of which the house now in question formed part, is not among the estates named. It appears from this letter that Morrells had a very large pool with a leading building society, and would be willing to create a similar pool with the plaintiffs. It should be explained that this refers to the device of arranging for a personalty fund to be put up as a general collateral security against loss by the building society on any individual mortgage, a device which enables the building society with a reasonable degree of safety to advance on each transaction a sum very nearly approximating to the valuation. Negotiations as to the terms on which Morrells would be prepared to give the plaintiffs the business of thus financing purchasers on Morrells' estates continued through 1933. About the end of 1933, the brochure relating to the Coneyhall Estate was in the plaintiffs' hands, as appears from a letter from them to Morrells dated Jan. 3, 1934. The plaintiffs criticised some of the statements in it relating to building society advances, but did not criticise the important passage quoted above. In the course of that month, the negotiations between Morrells and the plaintiffs reached the stage of the preparation of a draft agreement, and, from a letter of Jan. 12, 1934, from the plaintiffs to their surveyors, it appears that the Coneyhall Estate was one of the estates to which the arrangements were to apply. The abstract of title to that estate was sent to the plaintiffs' solicitors on Feb. 6, 1934. The terms of the agreement between Morrells and the plaintiffs were settled during February, and the agreement became a binding agreement between Morrells and the plaintiffs early in March. On Mar. 12, the plaintiffs asked for, and on Mar. 13 they were supplied with, spare copies of the brochure.

These being the facts, the question for consideration is what it was that induced the defendant, who in February had entered into the two contracts with Morrells on the faith of the false representations contained in the brochure, to carry out those contracts, and become a party to the advance of £693 which the plaintiffs made to enable her to carry out those contracts. It is obvious, in our judgment, that her action was induced, and that the plaintiffs must be taken to have known that it was induced, by the misrepresentations in the brochure which the plaintiffs knew to be false. The judge recognised that, if the plaintiffs knew in Mar., 1934, of the representations in the brochure (and, from the correspondence to which we have referred, it is quite plain that they did), they would be acting dishonestly if they associated themselves with Morrells in the business of financing purchases which to their knowledge must have been induced by representations which both the plaintiffs and Morrells knew to be false but the purchasers believed to be true. In our view, the judge ought to have proceeded to the conclusion which appears to us to follow quite plainly—namely, that on these facts the plaintiffs cannot escape liability for the fraud to which, by their action, they made themselves parties.

It is only fair that, while we share the regret of the judge that no director of the plaintiffs came forward to explain the directors' views, we should make it clear that the facts before the court are not inconsistent with the personal honesty of the directors individually. There is nothing to show that the official who conducted the correspondence and studied the brochure and sanctioned its use ever placed the brochure before the directors. It may be that the only thing which can fairly be said against the directors is that they employed an official who conducted the society's business fraudulently. However, the facts that the business was conducted fraudulently by the society's official and that the society must be visited with the consequences of the fraud appear to us to be quite clearly established by the evidence.

The question still remains as to what damage was occasioned to the defendant by the fraud, for, in the absence of evidence of actual damage, the fraudulent misrepresentation cannot of itself lead to any relief against the plaintiffs. It was ingeniously suggested that no damage has resulted to the defendant, in that she has a house worth, as she admits, £250, she is free from any possibility of a claim by Morrells, since Morrells have in fact been paid, through the medium of the society, for the house, and the plaintiffs have failed to establish their mortgage against her. On the other hand, she has paid out no more than the £121 16*s.* already mentioned and the £34 paid to Morrells. The answer is that, notwithstanding the dismissal of the action, the defendant is still in peril of a claim by the plaintiffs for the excess of £693 in fact advanced by them, with interest, over the £121 16*s.* which she has already paid. True it is that the plaintiffs have not proved that she executed the deed which they propounded in the action as her deed, but she has never disputed—nor, of course, can she dispute—that £693 was in fact provided by the plaintiffs and applied in discharge of Morrells' claims against her.

In our judgment, a consideration of the result of the fraud leads with but little difficulty to a conclusion as to the correct measure of damage, if it be borne in mind that, where an injury is to be compensated by payment of damages, the court should, in settling the sum of money to be given by way of reparation for the damage suffered, arrive as nearly as possible at that sum of money which will put the party who has been injured, or who has suffered, in the same position as that in which he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation: see *per* LORD BLACKBURN in A *Livingstone* v. *Rawyards Coal Co.* (5), at p. 39. The plaintiffs' fraud induced the defendant to accept liabilities to them based on the view that the house was worth the £730 which had to be paid for it. That is to say, it induced her to accept a liability for £693, being a sum which, for all material purposes (the discrepancy of some £3 may be disregarded), B was less by the £34 paid by the defendant to Morrells direct than the pretended value of the house. On the footing that the house was worth £730, she was prepared to accept liability for an advance less by £34 than the pretended value of the house. She was obviously prepared to pay for the house at its true value, and it may be assumed that, if C she had become purchaser at the true, instead of at the exaggerated, value, she would have been prepared to accept liability for an advance less by £34 than the true value. Rescission being now out of the question, she cannot escape liability for the larger figure of £693, and the damage is thus measurable by the difference between the position as it now D stands and her position as it would have been if the transaction had been precisely the same in every respect save only that she had become purchaser of the house at a price equal to, but not more than, its true value, and had accepted a corresponding liability as a borrower from the plaintiffs. E

The damage is no doubt assessable in one sense as at the date at which she was induced by the fraud to act to her own detriment and make herself liable for the larger figure, but, as the liability includes a liability for interest until repayment, the matter is not concluded by merely measuring the difference between the sum which she was induced to F borrow and the sum which she would have borrowed had there been no fraud. The easiest way to make the matter plain is to state in accurate terms exactly the relief in this regard to which, on the view which we have expressed above, the defendant will be entitled. There should be inquiries as follows. 1. What sum is, at the date of the certificate, G due to the plaintiffs by the defendant on the footing that on Oct. 10, 1934, she became indebted to the plaintiffs in a sum of £693, repayable with interest at 5 per cent. per annum, and that she has since repaid to the plaintiffs on account of that indebtedness £121 16*s*., as in para. 9 of the counterclaim alleged? 2. What was the true value on Oct. 10, 1934, H of the plot of land with the house and garage thereon in the pleadings mentioned? 3. What sum would, at the date of the certificate, be due to the plaintiffs by the defendant on the footing that on Oct. 10, 1934, she became indebted to the plaintiffs in a sum less by £34 than the said true value, repayable with interest at 5 per cent. per annum, and that she has since repaid to the plaintiffs on account of that indebtedness £121 16*s.*, as in para. 9 of the counterclaim alleged? This will be followed by an order that the plaintiffs are to pay to the defendant by way of damages for fraud within 14 days after the filing of the certificate the amount by which the sum found in answer to inquiry No. 1 exceeds the sum found in answer to inquiry No. 3.

It is to be borne in mind that this is not an action by the plaintiffs for foreclosure or for the recovery of money lent, nor is it an action by the defendant for redemption. It may well be, however, that the result of the inquiries may be of assistance to the parties in any future steps taken, whether by the defendant for redemption or by the plaintiffs for recovery of money lent. It is also to be observed that, if, simultaneously with the ascertainment of the damages, the plaintiffs were to claim foreclosure or the defendant were to claim redemption, the net result would be that the defendant would be found entitled to redeem on paying exactly the sum which she would have had to pay had she bought the house for the true value, borrowed the price less £34, and since paid £121 16*s.* towards paying off the debt. In other words, the parties will find themselves in just the position in which they would presumably have been had the fraudulent representations not been made.

The order of this court will be as follows. The defendant's appeal will be allowed and the judgment of BENNETT, J., dismissing the counterclaim with costs will be reversed, and in lieu thereof there will be an order for the inquiries stated above, and an order as stated above in regard to the payment of damages. The costs of the inquiries will be reserved, with liberty to apply. As regards the costs of the counterclaim, the defendant has failed in regard to a substantial part of the counterclaim—namely, the claim that the advance was *ultra vires*. The plaintiffs will be ordered to pay one half of the defendant's costs of the counterclaim. The plaintiffs will be ordered to pay the defendant's costs of this appeal.

There is one further matter to be mentioned. It was indicated to us, thought not in very clear terms, that the plaintiffs might be willing to call a halt to litigation by abandoning any further claim against the defendant in respect of the transaction in the pleadings mentioned. They should have an opportunity of doing so. If, before the order of this court is drawn up, the plaintiffs are willing to disclaim by their counsel any further rights against the defendant in respect of the transactions in the pleadings mentioned, and to undertake to give up to her on demand the conveyance of the house and land from Morrells to her, the order of this court may be drawn up as an order (*a*) allowing the appeal and reversing the judgment of BENNETT, J., dismissing the counterclaim with costs, (*b*) embodying a disclaimer and undertaking by the plaintiffs by their counsel as above stated, and (*c*) ordering the plaintiffs to pay one-half of the defendant's costs of the counterclaim.

However, this should make no difference as to the defendant's costs of the appeal, which will, as above indicated, be paid by the plaintiffs.

Appeal allowed.

Solicitors: *W. H. Thompson* (for the appellant); *H. Boustred & Sons*, agents for *J. Eaton & Co.*, Bradford (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*] A

DAVIDSON *v.* BARCLAYS BANK, LTD.

[King's Bench Division (Hilbery, J.), **January 25, 1940.**]

Bankers—Cheques—Dishonour—Mistake in keeping account—Cheque marked B
"Not sufficient" when sufficient money in account—Duty of bank to make
communication—Qualified privilege.

On Dec. 17, 1938, the plaintiff, a credit bookmaker, issued a cheque
for £2 15*s.* 8*d.* which, when presented to the defendant bank, was
dishonoured by them, being marked with the words "Not sufficient."
On the previous day, the plaintiff had sent the bank a stop order in C
respect of a previously-drawn cheque for £7 15*s.* 9*d.*, and, if the bank
had acted in compliance with this order, there would have been in the
plaintiff's account more than sufficient to meet the dishonoured cheque.
The bank, however, debited the plaintiff's account with the amount of
the stopped cheque, with the result that the balance shown in his account,
which was not the true balance, was insufficient to meet the cheque for
£2 15*s.* 8*d.* The plaintiff alleged that the words "Not sufficient" were D
a libel upon him in his way of business, and claimed damages accordingly.
The bank admitted that the words in their ordinary significance were
capable of a defamatory meaning, but contended that the occasion upon
which the words were written was one of qualified privilege:—

Held: the bank could not, by making the mistake of thinking that
there were insufficient funds to meet the cheque, create on their own E
part a duty to make a communication the necessity for which had never
arisen. Similarly, they were not making a communication on a matter
of common interest both to them and to the payee of the cheque, because,
except for their mistake, there was no matter of common interest connected with the cheque which called for a communication. The defence
of qualified privilege, therefore, failed. F

[**EDITORIAL NOTE.** The contention here was that the bank could rely upon
their own mistake in keeping the customer's account to create a privileged occasion.
To create a privileged occasion there must be shown to be a duty to make the communication or that the communication was a matter of common interest to the
parties, but the bank could not have established either of these matters without
relying upon their own mistake. This, it is held, they could not be allowed to do. G
It would not appear that this defence to an action on a dishonoured cheque has
been taken in any previous case.

As to Wrongful Dishonour, see HALSBURY, Hailsham Edn., Vol. 1, p. 827, para. 1348; and for Cases, see DIGEST, Vol. 3, pp. 217-223, Nos. 549-584.]

Cases referred to:

(1) *Joachimson* v. *Swiss Bank Corpn.*, [1921] 3 K.B. 110; Digest Supp.; 90 H
L.J.K.B. 973; 125 L.T. 338.

(2) *Hunt* v. *Great Northern Ry. Co.*, [1891] 2 Q.B. 189; 32 Digest 121, *1528*;
60 L.J.Q.B. 498.

Action for damages for libel. A cheque for £2 15*s.* 8*d.* drawn by the plaintiff, a credit bookmaker, was, through a mistake on the part of the bank as to the state of the plaintiff's account, wrongfully marked with the words "Not sufficient," the use of which words, the plaintiff alleged, constituted a libel upon him in his way of business. The bank pleaded that there was a duty to make the communication, which was, therefore, made on a privileged occasion. The facts and arguments are fully set out in the judgment.

T. F. Davis for the plaintiff.

Geoffrey H. B. Streatfeild, K.C., and *Clive Burt* for the defendants.

HILBERY, J.: In this case, John Davidson, who is a bookmaker carrying on the business of a cash bookmaker at dog-racing meetings and of a credit bookmaker from his address, No. 78, Clapham Road, sues the defendant bank for damages for libel. The libel of which he complains consists of the words "Not sufficient" written on the face and at the top lefthand corner of a cheque drawn by the plaintiff on his business account with the defendant bank at its branch at 414, 416, Kennington Road, London. The plaintiff complains that those words are a libel upon him in the way of his business. He says that they imported to anyone who read them, placed in that situation, that the plaintiff was a person who had drawn a cheque upon an account which he knew, or ought to have known, was not in credit to the amount of that cheque, that the firm of J. Davidson & Co., the persons who, on the face of the cheque, were the drawers of it, and the plaintiff, as a partner, were, and the plaintiff was, unable to pay the amount of the cheque, and that that meant to a reasonable being that it was unsafe to do business with the plaintiff or to give him credit—that is to say, to bet with him as a credit bookmaker.

At the close of the plaintiff's case, counsel for the defendants said quite frankly that he would not contend that the words in their ordinary signification placed upon a cheque were incapable of that defamatory meaning, nor did he contend that the words in their ordinary meaning, and as ordinarily understood by a person who saw them placed upon the plaintiff's cheque in that way, were anything but defamatory of the plaintiff in the way of his business. Then the defendants go on to allege by way of defence—and this was the defence which was urged before me, and has been the subject of the contest before me—that those words were placed by the bank upon that cheque on the occasion when that cheque was presented to them for payment, and that that occasion was an occasion of qualified privilege, and that they put upon the cheque those words, which were in fact false, in the belief that they were true.

There is no question but that the bank acted honestly in the matter. Somebody who chose to write those words on the cheque on behalf of the bank did so, making an honest mistake. The facts show, however, that it was, as it appears to me, a mistake which ought never to have been made. It was a mistake which one would think that a very indifferently qualified bookkeeper who used reasonable care would not have made, but which, none the less, as I have said, was made in this branch of this bank. The defence of the bank which has been fought might be summarised in this way: " We marked this cheque with a statement which was defamatory of our customer in the way of his business, suggesting against him that he was a person who could not meet a cheque for £2 15*s.* 8*d.* although he had drawn it and given it to one of his customers. He was drawing a cheque upon an account which had not got that amount in it, but the statement was made on a privileged occasion—an occasion which we say was one of qualified privilege—and through our inability on this occasion to keep our books correctly."

I can shortly state the other facts, for they lie in a very small compass. The plaintiff had opened this account for his credit bookmaking business with this branch of the defendant bank in Nov., 1938. I have seen the certified duplicate copy of the ledger account. If, as I am told, it was opened on Nov. 28, it appears to me to have always been in credit. Before Dec. 17, 1938, the plaintiff had issued a cheque for £7 15*s.* 9*d.*, payment of which he had stopped by a letter written to the bank on Dec. 16, 1938.

There is a letter in the correspondence on Dec. 19 from the defendants' branch at which the plaintiff had this account, acknowledging a letter from the plaintiff, dated Dec. 16, which had stopped payment of this cheque for £7 15*s.* 9*d.* drawn in favour of J. Harris.

Although the defendants were in possession of that stop order against this cheque in favour of Harris, nevertheless, on Dec. 18, when they received a cheque, dated Dec. 17, for £2 15*s.* 8*d.*, drawn in favour of S. Mark by the plaintiff on this account, they dishonoured the cheque, marking it with the words which are complained of: " Not sufficient." I say notwithstanding that they were in possession of the stop order upon the cheque drawn in favour of Harris, because, if they had acted obediently to the stop order, which was acknowledged by them in their letter of Dec. 19, and which was in their possession admittedly before the presentation of this cheque by the plaintiff in favour of Mark, and admittedly before the presentation of the cheque by Harris, provided they obeyed the stop order on the Harris cheque, they had enough funds, and a good deal more than enough funds, belonging to the plaintiff with which to meet the cheque for £2 15*s.* 8*d.*

I do not now know precisely how their mistake came about. I have had two witnesses called before me on behalf of the bank. One was an inspector for the bank, who, when this matter became a matter of acute controversy between the plaintiff and the bank, went and called upon Mark, the payee of the cheque which had been returned in this way, and had an interview with him and gave him an account of it which really did not substantially differ from that given me by Mark. The other, I think I am right in saying, was a chief clerk, and had been for

18 months a chief clerk at Kennington, but not either of the ledger clerks at Kennington, who could tell me what the system was which the bank employed when dealing with a cheque upon which there was a stop order, but who could not tell me what had in fact been done which gave rise to the mistake on this occasion. All he could tell me about that was what he had been told, apparently by one or other or both of the ledger clerks in this branch, one or other of whom had in fact made the mistake.

Perhaps it is putting it too high to say that one would have expected that, if an explanation was to be given of how the mistake arose, the persons who made the mistake should have been called as witnesses before me. It is not without some significance that the witness selected to come before me to explain how the mistake arose is a person who can really give me as first-hand evidence only evidence of the system which ought to have worked, and then tell me, upon what he has been told, how it came to break down on the occasion in question.

These further facts we know, however. The defendants having a stop order on this cheque of Harris's, there was placed on the face of the ledger account a square red adhesive label with the word, blocked out in white, very large and occupying no less than about half of the label, "Stop." One can only suppose—I hope it is a reasonable inference—that that form of label, which must leap to the eye when the ledger is opened at the page which has the label upon it, is used as a warning sign to the person who is going to the ledger to make an entry in it that there is a stop on the cheque which, in the lower half of that label, is described by its number and the name of the payee, and as a sign not to deal with that cheque as a cheque which is to be met, but to deal with it as a cheque upon which there is a stop order. Notwithstanding that, it is apparent that on this occasion the cheque upon which the stop order was in existence was debited to the customer's account in the debtor column on the page, and the resultant diminished balance was carried out in the balance column as the balance which was left over, and below that line that diminished balance was brought down to the lefthand side of the sheet in the column which is headed "Old Balance." There came to be on the face of the book, in those circumstances, a statement of a balance left over which would have been insufficient to meet a cheque of £2 15*s.* 8*d.* There was left over by that process, as it happened, a balance which was not the true balance at all, but an entirely unreal, though apparent, balance of only £1 9*s.* 10*d.*

As I say, in the absence of either of the ledger clerks, who are the actual people who made the mistake, I do not know how the mistake came about. The ledger was in such a condition, however, that, when the cheque drawn in favour of Mark was brought in, one or other of the ledger clerks went to the ledger, disregarding, of course, everything apparently except that the balance brought down on the left was

£1 9*s.* 10*d.*, and managing apparently to close his mind to the other things on that sheet which might, one would have supposed, have been sufficiently brought to his attention by the scarlet label and the word "Stop." Assuming that the £1 9*s.* 10*d.* is in truth the only balance, he deals with the Mark cheque, and carries out into the balance column the resultant overdraft balance, and then this cheque is returned marked "Not sufficient."

It is a little important to bear this in mind. The evidence given for the bank is that, owing to the system of the central clearance of cheques which the banks employ, whether a cheque is being met or is being returned, for its own convenience a bank must make an entry of that cheque in their books as a cheque which has been presented to the bank and dealt with by them, although it turns out in the end to be dishonoured. That is so that the total of the cheques coming through the clearing system to that particular branch can be checked and established, and every cheque accounted for. Thus, on the system, for the bank's own convenience, when the Harris cheque came in on the day that it did to be dealt with, it would be right for a ledger clerk first of all to make the entry as though that Harris cheque were being met. That is to say, he would put the name and the amount of it in the debit column and carry out the resulting diminished balance of the customer in the balance column. The cheque would then be put on one side, and, when the end of the banking day arrived, and it was therefore known that there was no cancellation of the stop order, the stop order would be given its full effect and the ledger clerk would go back—having that evidence of the cheque having been dealt with by the bank in the ledger—delete that entry, and restore the balance to what in truth it should be that evening. I am invited to believe that the error arose through one or other of the ledger clerks not taking that second step at the close of that banking day. It may be that that is the explanation, but, of course, the witness who was called before me quite rightly told me that, while he was told that that was how it occurred, he could not, of his own knowledge,. say that that was what happened, because, of course, he was not the person who actually dealt with the cheque. I think that there was a certain shyness, perhaps understandable, about putting into the box the person who had actually made this extremely stupid and highly dangerous blunder. If the bank, for their own convenience, make one entry at one time in the day which diminishes the customer's account, because the customer's account is being debited with the amount of a cheque which the customer has stopped, and the bank do that for their own convenience, unless it is put beyond any question of doubt and made a matter of absolute certainty that the second and cancelling entry is made at the end of the day when the stop order is persisted in, the customer's account stands in the ledger with the diminished balance, which is a wholly untrue balance, and which may lead to the return of any cheque which ought, in fact, to be met.

In those circumstances, it is conceded that, in truth, the balance then in the account should have been £9 5*s.* 7*d.*, and I say, in fairness to the plaintiff, that that was a lower balance than had generally been in the account up to then. I do not mean by that that there may not have been an occasion when the balance had been lower than that, but it was A a lower balance than had generally been in the account up to then. It is conceded that there was that amount, in truth, in the account, and that there was not any genuine or real reason why the plaintiff's cheque for £2 15*s.* 8*d.* should not have been honoured in accordance with the bank's duty to their customer.

B That is of importance when one considers this defence of qualified privilege which is raised. It has been said, I think, though at the moment I do not profess to have the authority before me—I think it was said by ATKIN, L.J., in *Joachimson* v. *Swiss Bank Corpn.* (1)—that the relationship of banker and customer is one of debtor and creditor, C with the additional feature that there is no obligation on the part of this particular debtor to seek out his creditor and to pay him. His obligation is only to pay this particular creditor when the creditor makes a demand for payment, or directs him to pay either the creditor or some person nominated by the creditor.

D When this cheque drawn by the plaintiff was presented to the bank, who were in funds sufficiently to meet that cheque, the duty of the bank was a duty to make payment of the amount of the cheque to the payee of that cheque. The interest of the plaintiff, of the payee of the cheque and of the bank—an interest which they had in common—was their E common interest in seeing that that payment was duly met. There was no duty on the bank to make any communication about the cheque to the payee of the cheque, or to the bank collecting on his behalf, unless there was in the occasion some circumstance which made it their duty to make such a communication. Nor was there a matter of interest common F to them and the payee and the customer calling for any communication, except and unless there was a circumstance in the occasion which gave rise to such a common interest in the subject-matter of such a communication. In other words, there was no duty to say any such thing as would give a reason why the cheque was not met, unless the occasion G was one which necessitated the cheque not being met. If the occasion was one which necessitated the cheque not being dealt with in accordance with the plain duty which arose as between the bank and their customer, then the occasion might arise for the making of a communication to explain or to afford the reason why the cheque was not dealt with H in the ordinary way.

It seems to me to be utterly and obviously fallacious to say: "Because we, the bank, have made a stupid mistake, so that we got it into our heads that the occasion was one when the cheque must be returned, therefore the occasion was one when we had to make the communication to explain why the cheque was returned." One may make a mistake

in a communication which one makes in good faith on a privileged occasion, and it is an answer, if that mistake is a defamatory one, to say: "The occasion was one of qualified privilege, and I made the mistake, but it was an honest mistake, made in the honest belief that it was true." However, you cannot, by making a mistake, create the occasion for making the communication, and what the bank seek to do A
here is to create an occasion of qualified privilege by making a mistake which called for a communication on their part. That is the difference—the essential difference—between this case and such a case as that which counsel for the defendants was putting in argument —namely, the case where a person comes to another for a character, or B
where, in the other example which counsel gave, and upon which he argued, the customer of a bank gives the name of the bank manager as a reference to the person from whom he proposes to rent premises. In either of those examples, when the request for the character is made, the occasion which is qualified privilege is already constituted, and, if, C
on those occasions, once that occasion has been constituted through the circumstances, there is made a communication which is mistakenly defamatory, subject to the other qualification which I have mentioned, of course, the occasion is one of qualified privilege. The communication is privileged, and no action will lie. In each of those examples, the D
occasion is already there when the communication is made, and the mistake then is made in the communication truly upon an occasion which is one of qualified privilege. Again, however, in either of those cases given by way of example, it is not the mistake which creates the occasion. It is the occasion which is followed by the mistake. E

I have said that because, whether one looks at this matter as one of an occasion where there was a duty to make a communication, or whether one looks at it as one where it was a communication made on a matter of interest common to both parties, exactly the same argument seems to me to lie, and exactly the same kind of reasoning appears to me to be F
correct. The duty of the bank, being in funds, was to meet this cheque. If they are not in funds, it may well be said, I think, that a duty arose on the occasion to make a communication as to why the cheque was not being met, but, by deceiving themselves into thinking there were no funds, and so creating the occasion, they could not create on G
their own part a duty to make the communication, the necessity for which had never arisen. Similarly, they were not making a communication on a matter of common interest to them and to the payee of the cheque, because, again, except for their mistake, there was no matter of common interest connected with this cheque which called for a communication. H
There was a matter of common interest, I should have thought, common to them and to the payee of the cheque and to their customer, if the occasion called for the rejection of the cheque. However, unless the occasion called for the rejection of the cheque, there was no such matter of common interest. The matter of common interest which they

had with their customer and with the payee, if there were sufficient funds to meet the cheque, was the paying of the cheque.

I think that examples might easily be given to show that that is right—for example, such a case as *Hunt* v. *Great Northern Ry. Co.* (2), where a railway company had dismissed one of their servants for alleged gross neglect of duty, then published his name, and the reasons for his dismissal, and the fact that he had been dismissed, in a monthly circular addressed to the company's servants. That was held to be privileged, because the occasion of the privilege had already arisen when the company had treated the servant in that way and for those reasons, for, the moment they had treated one of their servants in that way and for those reasons, they had an interest, in common with the rest of their employees, in their employees' knowing that one employee had been dealt with in that particular way for that type of behaviour. That is an example which I give because it shows that the occasion which gives rise to the matter of common interest must be existent. It could scarcely have been said, it appears to me, that there was an occasion of common interest between the railway company and its servants in that matter, if the fact had been that the particular servant named never had been guilty of any neglect, never had been dealt with by way of disciplinary action, and never had been dismissed. Thus, I think, it is quite plain and beyond doubt that this plea of a privileged occasion and a privileged communication made upon that occasion fails. I turn, therefore, to the question of damages, which is the only question remaining to be dealt with.

Here was a plaintiff who was carrying on business as a credit bookmaker. I sit here to act both as juror and as judge in arriving at the right measure of damages. It is conceded that, by writing these words on a cheque for a very small amount—namely, £2 15*s.* 8*d.*—the bank were certainly imputing that the plaintiff, a credit bookmaker, was drawing a cheque on an account which had not £2 15*s.* 8*d.* in it. I cannot imagine anything much more damaging to a credit bookmaker than a statement which suggests that he cannot meet a cheque for £2 15*s.* 8*d.* if the backer has won from him in bets on a credit basis as much, or as little, as £2 15*s.* 8*d.* I should think that there was hardly any other business which is more sensitive on the subject of its credit than that of a credit bookmaker. No backer is going to bet, hoping, as he always does, that on this occasion he has selected at long odds a horse which is going to win and bring him a good deal of money for a comparatively small stake, if he thinks that the credit bookmaker is a person who could not meet a cheque for £2 15*s.* 8*d.*, but who might none the less send him a cheque for £2 15*s.* 8*d.* which was going to be returned.

Mark, to whom this cheque was made payable, has told me that the bank official called upon him and told him that this was a mistake at the bank. I have seen and heard the inspector of the bank who paid that visit to Mark, and I have had the advantage of hearing the account of that interview from each of them, given as well as he can restate it to me. Mark said that, when he was told that, it was true that the inspector expressed the hope that, now Mark had heard that it was the mistake of the bank, he, Mark, would go back to do business again with the plaintiff. However, Mark told me that he said that he would rather not, because it made him begin to think that the plaintiff's financial circumstances were not such as he had thought, and not such as would lead him to do business with the plaintiff as his credit bookmaker. When he was cross-examined further, he said that the fact was that he had always thought that banks could not make a mistake, and obviously Mark was one who wanted a lot of persuasion to believe that a bank could make a mistake such as this. These defendants, at any rate in this court and in this action, have demonstrated that a bank can make such a mistake. Mark doubted if they could make such a mistake unless the plaintiff was in a very different position financially from what he supposed. I have not any reason to doubt that those observations were made by Mark, and were honest. They do not seem to me to be wholly unlikely views for a man in his position to have formed. It does not seem to me to be unheard of that a man should hold very strongly what has perhaps become an old-fashioned faith—namely, the belief that banks do not and cannot make mistakes in their customers' accounts as mere matters of book-keeping.

Parfait, another customer, was called, and he said that he worked on a commission. He laid off bets and worked as between bookmakers and backers on a very narrow margin. He heard about this from a conversation with Mark, and he has done no business with the plaintiff since, because he would not run the risk.

Those are just examples, of course, of the way in which, in a business like that of a credit bookmaker, once there is a breath of suspicion affecting his credit, it has immediate consequences. I am not overlooking the fact that publication here was made, of course, to the collecting bank and to Mark, the customer for whom the collecting bank was presenting the cheque, but I also am not overlooking the fact that, though the bank sought an interview, and by word of mouth stated that a mistake had been made, when complaint was made to them in this matter by way of letter there was no acknowledgment of a mistake, and no letter acknowledging a mistake has, indeed, ever been written, nor is there put on the record of this court any acknowledgment of a mistake, so that the plaintiff is left without anything in writing binding the bank, which he can ever produce to anyone who has heard about this matter, to show that the bank, in truth, have made a mistake. Moreover, there seems to me, if I may say so, to have been a very pronounced shyness on the part of the bank about leaving a trace anywhere in writing on their behalf that they have made a mistake. When their own inspector called upon Mark, he had a great deal of difficulty in persuading Mark to abjure his faith in the infallibility of bank book-keeping, or to persuade Mark that in truth it arose by a mistake on the part of the bank. I wonder what chance the plaintiff himself, whose cheque was returned, has of ever persuading some other person who has heard of the matter to believe that it was the mistake of the bank, and not his error in drawing the cheque on an account which had not sufficient funds in it to meet the cheque.

However, I put that matter for the moment from my mind. Nevertheless, those are some of the results which follow in truth in the natural course from a libellous statement made without justification. It is all very well to say that a person calls round and has an interview with the individual who above all others was the first to whom the publication was made. Anyone in the business knows that such a thing as this, once it is done, is not confined to the person who immediately receives the information. Substantial damage is done, for the very good reason that nothing about a man travels so fast as that which is to his discredit. However, what I have to do is to say, having regard to the publication of the libel which I find, and having regard to the evidence, what is a proper sum to be given as a reasonable compensation for the injury which has been done to the plaintiff, and of course it must be sufficient to mark beyond a shadow of doubt the complete lack of justification for making the aspersion which was made by this means on the plaintiff's credit. I think that the right sum by way of damages is £250, and there must be judgment for the plaintiff for £250.

Judgment for the plaintiff for £250 *with costs.*

Solicitors: *Kingsbury & Turner* (for the plaintiff); *Durrant Cooper & Hambling* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

CANTER *v.* J. GARDNER & CO., LTD., AND ANOTHER.

[KING'S BENCH DIVISION (Tucker, J.), **December 13, 14, 1939.**]

Negligence—Building in course of construction—Liability of contractors and subcontractors—Hole made by contractors in part later under exclusive control of subcontractors left by them in safe condition.

The plaintiff, an employee of a subcontractor, was injured by falling into a hole in the floor of the basement of a building in course of erection. The hole had been made by the main contractors, the second defendants, and left for the purposes of the first defendants, who were subcontractors for the ventilation work under a contract from a firm who were themselves subcontractors. The hole was left in a safe condition, but, owing to the removal of some trunking, became unsafe about 2 days before the accident. It was not known who removed the trunking. The plaintiff sued both the defendants in negligence, with separate and alternative claims against each defendant:—

HELD: (i) the head contractors were not in control of the hole at the material time, and, there being no evidence that they ever became aware of the danger, they were not negligent.

(ii) the subcontractors were not liable, as they had left the hole in a safe condition and had no knowledge of the danger which had been created by the removal of the trunking. It was not part of their duty to anticipate the creation of such a danger.

[**EDITORIAL NOTE.** The present case differentiates the duty of the head contractor and that of subcontractors. Where the head contractor has given over the exclusive control of part of the work to a subcontractor, he ceases to be liable to employees of subcontractors for the dangerous condition of that part. The subcontractor, on his part, is responsible for the condition of part of the premises placed in his control, but, if, having carried his work as far as he can, he leaves it in a safe but not finally finished condition, by reason of the fact that other subcontractors have work to do there, then it is not his duty to anticipate that some person or other may come along and render unsafe that which he has left safe. Nor is he under any obligation periodically to inspect the work to see that it is still safe.

As to Duty to Invitees, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604, 605, para. 853; and for Cases, see DIGEST, Vol. 36, pp. 41-45, Nos. 247-281.]

Cases referred to:

(1) *Howard* v. *Farmer & Son, Ltd.*, [1938] 2 All E.R. 296; Digest Supp.

(2) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(3) *Kimber* v. *Gas Light & Coke Co.*, [1918] 1 K.B. 439; 36 Digest 18, *83*; 87 L.J.K.B. 651; 118 L.T. 562.

Action for damages for personal injuries alleged to be due to the negligence of one or other or both of the defendants. The facts are fully set out in the judgment.

P. L. E. Rawlins for the plaintiff.

Montague Berryman for the first defendants.

D. P. Maxwell Fyfe, K.C., and *B. L. A. O'Malley* for the second defendants.

Tucker, J.: This is a claim by the plaintiff, Robert William Canter, against two defendants. The first defendants are J. Gardner & Co., Ltd., and the second defendants are Demolition and Construction Co., Ltd. The claim, which is based on the negligence of the defendants, is against both, or one or other, of them for damages for personal injuries which the plaintiff suffered on Nov. 16, 1938, when he was working on a block of flats at Porchester Gate, Bayswater Road, which were in course of construction. The plaintiff was a workman employed by the firm of Marryat & Scott, Ltd., who were engaged as subcontractors in the installation of lifts at the premises. The second defendants, Demolition and Construction Co., Ltd., were the main contractors for the erection of this block of flats. The first defendants, J. Gardner & Co., Ltd., were sub-subcontractors. That is to say, the second defendants had subcontracted the ventilation work at the building to a firm called Scull & Co., who had again subcontracted to J. Gardner & Co., Ltd., the first defendants in this action.

On Nov. 16, 1938, at about 2.30 p.m., the plaintiff went to these premises to do some work in connection with the installation of the lifts by his employers, Marryat & Scott, Ltd. It was his first visit to the building, and he was not familiar with it. On his arrival, he had occasion to go into the basement to fetch a split pin from the charge hand who was working there. He went across the length of the basement, got the split pin that he required from the charge hand, and then returned by a slightly different route. On his return, he stepped into a hole about 2 ft. deep and about 2 ft. 6 ins. square, with the result that he broke a bone in his foot. He was then unfit for work until July, 1939, when he became fit for light work. He is not yet fit to resume his full heavy work, which entails working on ladders, and there is some conflict in the medical evidence as to whether or not he will ever be fit for doing such heavy work as that.

The facts are these. On Nov. 16, the lighting in this basement was dim, but I am satisfied that it was adequate for all the ordinary and normal work which was being done in the basement. I am satisfied that there was no difference between the lighting in that basement on Nov. 16 and the lighting which there had been during the previous four or five months during which the work had been going on, except, of course, that some days are lighter than others. There was no evidence that Nov. 16 was a particularly bad day. I am satisfied that the lighting, although dim, was adequate for the performance of the work of the various subcontractors being performed down there. There was evidence that any subcontractor who desired more light could obtain it, and there was some evidence that on one occasion one subcontractor had required some further light. In saying that the lighting was adequate, I do not mean to say that the lighting was adequate if anybody had known that there was an unguarded hole in the basement. I am only saying that, in my view, the lighting was adequate for the proper performance of the work which was being done there. It was dull, however, and, to anybody unfamiliar with the place who had to pick his way about, it was no doubt somewhat difficult. There were piles of material there, as one would expect to find in a building in course of erection, and, indeed, there were various subcontractors working down there.

The hole into which the plaintiff fell had originally been made by the second defendants, and was left in the floor because it was required later on by the first defendants, J. Gardner & Co., Ltd. They required a hole to be left in the floor into which they could insert material called trunking, which was to be used as shafts in connection with the installation of the ventilating system. That hole having been made and left by the second defendants, Demolition and Construction Co., Ltd., it is not material for me to find in what condition it was left at any time prior to Nov. 3. The evidence is that it was covered over with some boards, but I do not think it is material to me to investigate as to what the condition of that hole was prior to Nov. 3, because on Nov. 3 the first defendants, J. Gardner & Co., Ltd., took over the hole, so to speak. That is to say, they proceeded to put into it the trunking in connection with the ventilating system. Having put that trunking in, they then discovered that they could not complete the whole job and connect it up with some other trunking which was going to run in a horizontal position along the ceiling, because they were told that the electricians were going to be working there, and that the trunking would interfere with them. The vertical piece of trunking was left in this hole. It was projecting about 6 ins. below some flanges which protruded and rested upon some boards, and there was some angle iron, which left a gap of about 6 ins. round three of the four sides of this square trunking. Then it went up towards the ceiling, and it was affixed to a pipe on the wall or the ceiling. It was affixed by a rope tied round on to a pipe, and it was left in that position.

That was admittedly a temporary operation, in the sense that it was not intended to be permanent, and at some future time, when the electricians had finished their work, the employees of J. Gardner & Co., Ltd., would return to that trunking and finish the work. In the meantime, it effectively filled this hole in the position in which it was placed and with the boards round it. If it had remained in that position, I am satisfied that the hole into which it was placed would have been no danger to anybody. However, it did not remain in that position, but, at some date prior to Nov. 16, came out of position. On Nov. 16 there was nothing in the hole. The trunking was lying adjacent to the hole, and there was some indication that it had been dented slightly at the end. There is no evidence as to when it came out of the hole, except that the general foreman of the second defendants said that it had been in position in this hole about two days prior to the accident. It had apparently remained in position from Nov. 3 until Nov. 13 or Nov. 14. Some time between Nov. 13 or Nov. 14 and Nov. 16 it had come out, and there was this open hole remaining into which the plaintiff stepped.

It is said that those facts disclose negligence on the part of both defendants, or on the part of one or other of them. The negligence alleged is set out in the statement of claim, and I think it is necessary, particularly in a case of this kind, to see precisely what is the negligence which is alleged. The same negligence is alleged against both defendants, and it is as follows:

> (*a*) in causing or permitting a deep hole to be made in the floor of the basement. (*b*) in failing to fence or guard the said hole. (*c*) in failing to give warning of the presence of the said hole. (*d*) in failing to provide adequate lighting in the neighbourhood of the said hole. (*e*) in removing from the said hole the boards which guarded the same or in failing to secure that the same should remain in position. (*f*) in permitting the said hole in the said premises to be in such a position and/or condition as to amount to a concealed danger or trap to persons lawfully using the said premises.

It is necessary to ascertain the precise duty which is owed by persons in the position of these defendants to a man in the position of the plaintiff. I take first the case of the second defendants, Demolition and Construction Co., Ltd. I think that the position of head contractors in a case of this kind is to be found in *Howard* v. *Farmer & Son, Ltd.* (1). In that case, the headnote is as follows :

> The plaintiff was a workman engaged in building operations. The first defendants were the general contractors, and the second defendants were subcontractors
> engaged in putting in the staircase in a new building. At the material time, there
> was a ladder (provided by the general contractors) from the ground up to the second
> A floor, but no ladder from the ground to the first floor. The subcontractors had put
> in a staircase from the ground to the first floor, which was incomplete in the following respects. . . . The plaintiff, almost immediately before the accident, had
> gone up this staircase without mishap, which he explained by saying that he went
> up two steps at a time, but, upon coming down, his foot slipped through the hole
> due to the missing tread, and he was seriously injured :—
>
> HELD : (i) the plaintiff had no cause of action against the subcontractors, as
> B the staircase was obviously incomplete.
>
> (ii) the absence of a ladder from the ground to the first floor was not in effect an invitation to workmen to use the incomplete staircase.
>
> (iii) the contractors had no power to invite or license any person to use the incomplete staircase, which could only be done by the subcontractors.
>
> (iv) the accident was due to the plaintiff's own want of care, and the action failed.

C When one reads the judgment in that case, I think it becomes apparent
that, although head contractors in cases of this kind are, generally
speaking, in the position of invitors to the workmen of subcontractors
working on the premises, they cease to be in that position when any
part of the premises is given over into the exclusive control of the
D subcontractors who are working there. This case of *Howard* v. *Farmer &*
Son, Ltd. (1) was a case where, on the facts, it was quite easy to see
that the particular staircase which was being erected by the
subcontractors had passed into their exclusive control.

The case with which I have to deal is not such a clear case as that,
E but I think that the duty of an invitor exists in the case of a head
contractor—at any rate, as regards those portions of the building in
which he remains in occupation and control. It is not necessary for me
to decide what duty he owes in the case of some danger arising on some
part of the premises of which he is not in control, when he becomes aware
F of the existence of that danger. In this particular case, there is no
evidence that the second defendants ever became aware of the dangerous
condition of this hole as it existed from about Nov. 13 or Nov. 14 until
Nov. 16, but I am satisfied that, as from Nov. 3, they were not in
control of this particular hole which they had previously made in the floor
G and left for the subcontractor. Therefore, I do not think that, between
Nov. 3 and Nov. 16, they owed the duty which is owed by an invitor to
an invitee in respect of premises in the occupation and control of the
invitor when the invitee is there on the invitor's invitation.

As I have said, it is not necessary for me to decide what the position
H would be if, during that period, although the head contractors were not
in actual control of the part of the premises which is described as
being dangerous, none the less they knew that that part of the premises
had become dangerous, and took no steps to warn persons who they
knew would be lawfully using that part of the premises.

If that is the correct position, I do not think it is material in this

particular case whether the duty of an invitor is, as laid down in *Indermaur* v. *Dames* (2), the duty to prevent damage from unusual danger he knows or ought to know, or whether his duty is to take reasonable care to see that the premises are reasonably safe, because, whichever is the standard, I do not think that, from Nov. 3, the duty existed. If
I am wrong about that, and the duty continues, then the only suggested A
negligence, in my view, would be that there had been some failure properly to inspect this part of the premises and so ascertain that the trunking had been left in a dangerous condition, or that there should have been such an inspection as would in fact have revealed that there was
an open hole there for some unspecified period prior to Nov. 16, when B
the accident happened. With regard to that, it is to be observed that there is no allegation in the pleadings of such breach of duty, and I do not think that there is a duty on the part of the head contractor to go round inspecting the work of every subcontractor which is, apparently,
on its face, in proper condition, and not obviously dangerous. I think C
that, if any duty remained on the head contractors after Nov. 3, there was no breach of that duty in failing to inspect thoroughly this trunking which they saw in position. Nor do I think that there was negligence in inspecting or going round that basement only once every two or
three days, as the head foreman said he did. However, as I have indicated, D
there is the further obstacle that no such amount of negligence is alleged in the pleadings. Therefore, I think that, as against the second defendants, the head contractors, this action fails.

With regard to the first defendants, J. Gardner & Co., Ltd., the
position, I think, is more difficult. With regard to them, the case is E
really put in this way. It is said that they were the cause of this open hole on Nov. 16. That is true, of course, in the sense that it was the fact that their trunking had been displaced which caused the accident to happen. In my view, however, in order to succeed against the first
defendants, the plaintiff must establish either that this trunking was F
negligently affixed to the pipe or that there was some duty on the part of those defendants to inspect it from time to time, however securely it had been originally fixed, to see that nobody was interfering with it deliberately and wilfully. There again, neither of those specific allega-
tions of negligence appears in the statement of claim, but, assuming G
that they are covered by the allegations of negligence, I will proceed to deal with them, although I do not think that they are covered by the allegations of negligence. The uncontradicted evidence is that this trunking was secured in the way I have described, by the
rope to a pipe, and was standing in the hole in the way I have already H
indicated. The two men who put it in that position were named Pete and McCarthy. Pete was a fitter, and he said this:

> I tied the top of the duct to the pipe with a piece of rope. The bottom was in the hole. At the floor-level there was an angle iron in position. I left it firmly in position. We placed boards covering up the gaps to 6 ins. at their sides. We left the basement and worked on the upper floors.

He said that the trunking was firmly fixed. He knew nothing about the accident till January, although he was working in other parts of the building until after Christmas. He said that the trunking could not have fallen in the position in which they left it, and that it must have been untied by somebody. He also said that it was a temporary job. A That was admitted to be so, because the men were going to come back later to finish the demolition. McCarthy said:

> We fixed boards round the bottom and also tied it with rope at the top.

In cross-examination, he gave this answer:

> B We expected to be away about an hour. If we had known we should be away for three weeks, we should not have left it like that.

That, I think, wants careful consideration. Am I to say that, because of that answer, the whole of the rest of the previous evidence of this witness—namely, that he had sworn that it was safely and securely C fixed—is nullified ? He does not say why they would not have left it like that if they had known they were going to be away for three weeks, and I do not think that, in the absence of any other evidence to the contrary, I ought to draw from that one answer the inference that it had been insecurely and negligently fixed on Nov. 3. It is to be observed D that, although it may be difficult for a plaintiff to prove his case, none the less that is his duty in law. There has been no evidence at all with regard to this rope, or with regard to its having been insecurely fixed, except for this one answer of Pete's mate in cross-examination, and I do not feel justified in coming to the conclusion that that one answer E nullifies his previous evidence—which stands uncontradicted by any other evidence—that the trunking was securely fixed, that it was safe, and that it must have been untied by someone else. As I say, no evidence was given as to when it fell, as to what the condition around the hole was after it had fallen, or as to what had caused it to fall. Those matters F remain wrapped in mystery, and I do not think that I am justified in drawing the inference that, merely because it did not fall after it had been up for about a fortnight, it must have been negligently or insecurely fixed, when two men have sworn to the contrary.

Then it is said that they should have anticipated some possible or G probable deliberate interference by some other subcontractors or by some other person using that basement. There, again, there is no evidence to show whether or not it was deliberately done by somebody else. There is no evidence at all to show how it became dislodged, and I do not think that it is negligence on the part of the subcontractor to H leave something in this condition, assuming it to have been securely fixed, because he must be taken not to anticipate that some other subcontractor would deliberately remove what he has left securely fixed, and further, having deliberately removed it, would then fail to replace it and would leave a dangerous unguarded hole. I cannot persuade myself that the duty is as high as that, or that there is any duty on them to pay a daily visit of inspection, always assuming that the trunking had been firmly and adequately put in position originally.

I think that the duty of the subcontractors, J. Gardner & Co., Ltd., is a duty somewhat different from that owed by the head contractors, who are in the position of invitors. It seems to me that the duty owed by one subcontractor to the employees of another subcontractor is similar A to the duty which was found to exist in *Kimber* v. *Gas Light & Coke Co.* (3). In that particular case, it was only necessary to say what the law was with regard to the case where the defendants actually knew of the existence of a danger which they had themselves created. PICKFORD, L.J., as he then was, said, at pp. 443, 444 : B

> The real point made by the defendants is that, as there was no negligence in making the hole and leaving it unfenced, they were under no duty to the plaintiff to warn her of its existence, as they were not occupiers of the house and did not invite or license her to enter it, and that therefore the second finding of the jury cannot be supported. The defendants by their servants were not in occupation of the house, but they had sufficient control of it by the licence or invitation of the C owner and tenant to justify them in making a hole in the flooring for the purposes of their work. I do not think that they invited or licensed the plaintiff to come upon the premises, and I attach no importance to the fact that the defendants' workmen opened the door and told the plaintiff which part of the house was to let except that it informed them that she had come by the licence of the tenant to inspect the premises, and that she was going directly to the landing in which they had made the hole. They of course knew the conditions as to lighting and otherwise which existed on the landing. D If they had known that persons were likely to come to the premises for lawful purposes I think they would have been negligent in making and leaving a hole which under the circumstances would be a concealed danger to such persons unfenced and without warning. . . . In this case they had no reason to expect such persons to come, and therefore the making of the hole was found by the jury not to be negligent, nor was the leaving it unfenced, up to a point, negligent. But when the workmen let the plaintiff in and knew that she was there lawfully by the licence of the tenant and was going to the very landing E where the dangerous hole was, I think that the same principle applies.

In the same case, BANKES, L.J., said, at p. 445 :

> If a person creates a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the F danger which he has created, he is under a duty to give such person a warning. There may be cases in which the duty exists though actual knowledge of the danger may not be brought home to the person charged with negligence. It is not necessary for the purpose of the present case to discuss the rule except in its simplest form.

In the case with which I have to deal, the case is not in its simplest form, because this is not a case where the first defendants had actual G knowledge that a person was going to expose himself to an existing danger, or that in fact the danger existed. None the less, I think that, if they had known that they had not left this trunking securely fixed, it would have been their duty to take steps to prevent an accident, by warning or otherwise, without knowing that persons were lawfully using H the basement. I think that the duty as laid down in *Kimber* v. *Gas Light & Coke Co.* (3) would extend to the first defendants, although this is not a case like *Kimber's* case (3), where they actually saw the man, so to speak, walking straight towards the danger. For the reasons which I have already given, I feel that the plaintiff has failed to establish negligence on the part of either of the defendants in this case, and that, therefore, the claim fails. There must be judgment with costs for both defendants. I assess the damages at £750 in case of appeal.

Judgment for both defendants with costs.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Carpenters* (for the first defendants); *William Easton & Sons* (for the second defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re T. H. DOWNING & CO., LTD.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **January 24, 1940.**]

Companies—Scheme of arrangement—Priority of preference shareholders in company as originally constituted—No express words taking away priority—Construction of scheme.

A scheme of arrangement and reconstruction must be construed as not altering existing rights unless the language of the scheme and the new articles of association giving effect to it are such as to compel that interpretation.

[EDITORIAL NOTE. It was here contended, and had been held in the court below, that it was necessary to find in the language of the scheme some recognition of the continuance of the existing rights of priority, but the Court of Appeal has decided that this is a wrong view of the onus of proof. The language of the scheme must be such as to compel the court to come to the conclusion that such rights are taken away. In no other circumstances can an implication of the loss of existing rights be made.

AS TO CONSTRUCTION OF SCHEME OF ARRANGEMENT, see HALSBURY, Hailsham Edn., Vol. 5, p. 797, para. 1366; and FOR CASES, see DIGEST, Vol. 10, p. 1059, Nos. 7412, 7413.]

APPEAL by a representative preference shareholder in a company from an order of BENNETT, J., dated Nov. 6, 1939. The facts are fully set out in the judgment of the court delivered by SCOTT, L.J.

W. P. Spens, K.C., and *A. F. Maurice Berkeley* for the appellant, a preference shareholder.

D. Ll. Jenkins, K.C., and *W. Gordon Brown* for the respondents, ordinary shareholders.

M. L. Gedge for the liquidator.

Spens, K.C.: This appeal depends upon the construction of certain resolutions passed in 1933 and of a scheme of arrangement made in 1937 in pursuance of those resolutions. The resolutions admittedly attach definite priority of repayment of capital to the then preference shareholders. If that be right, the scheme of arrangement passed in pursuance of the 1933 resolutions has not deprived the preference shareholders of that priority. The scheme of arrangement retained part of the original preference capital as preferential, and converted the remainder of it into ordinary shares. That part of the preference shares which remained preferential was not affected by the scheme of arrangement.

Unless there is something which clearly deprives the preference shareholders of their rights, the preference must remain. The alteration of the dividend rights does not take away the rights concerning priority of capital. There is nothing which deprives the preference shareholders of their priority. If one is to be deprived of rights, this must be done in terms which one understands. It cannot be done in an ambiguous manner. The impairment of shareholders' rights cannot be implied unless the language is such as to require that interpretation.

Jenkins, K.C.: Resolutions were passed to obtain certain results, but there was no creation of new capital. The shares dealt with in the resolutions were part of the original capital. The preference shares were reduced from £1 to 10*s.*, and their name was altered. The preference shareholders were given some ordinary shares to compensate them. A new article was inserted in the articles of association, and that new article states what the capital will be on the new scheme coming into operation. It sets out the capital in a form in which it had not previously existed. The question is not a question of preserving the rights of the preference shareholders, but one of giving them new shares. The whole tenor of the scheme is directed to an entire reorganisation of the capital. The preference shares have become preference shares of a new type, because the new article is intended to define the rights attached to the shares.

Scott, L.J. [delivering the judgment of the court]: This is an appeal from a judgment of Bennett, J., on a summons in respect of the winding up of a company called T. H. Downing & Co., Ltd. The object of the summons taken out by the liquidator was to obtain a determination by the court as to whether or not the preference shareholders, after a scheme of arrangement had been adopted, were entitled to priority over the ordinary shareholders in respect of repayment of capital out of the assets in the winding up. Counsel for the class of preference shareholders submitted to us that the decision of the judge that the preference shareholders had lost their priority in distribution of capital was wrong. He submitted that it was wrong because, even assuming that the express language of the scheme of arrangement and the new articles passed as part of the scheme of arrangement did not quite clearly and expressly recognise the continuance of the preference shareholders' old right of priority in regard to repayment of capital, it would be wrong to interpret the articles as taking away that right, unless the language was such as to compel that interpretation. The judge was not satisfied that the language did, on its fair interpretation, actually recognise the right as continuing, and, because he was not able to find express words continuing that right, he felt obliged to come to the conclusion that the right was taken away. In my opinion, and in the opinion of the whole court, that conclusion was erroneous.

In order to deal with the matter, it is necessary to go back a little in the history of the company in order to see how the position came about which resulted ultimately in some modifications of the rights of the preference shareholders in 1937. The history begins in 1933 with three resolutions passed at that time. The first was that the

> . . . meeting of the holders of the 8 per cent. cumulative preference shares of the company hereby sanctions on behalf of all the holders of the said shares the reduction of the capital of the company, the increase of the capital of the company, the variation or alteration of the rights attached to the said shares and the alteration of the articles of association of the company proposed to be effected by the resolutions set forth in the notice convening an extraordinary general meeting of the company for June 8, 1933, . . . and hereby sanctions on behalf of all the holders of the said shares every variation or alteration of the rights attached to the said shares intended to be effected by the said resolutions.

Then there was a similar extraordinary resolution passed by the holders of the 10 per cent. cumulative preference shares, and a similar resolution was passed by the holders of the ordinary shares. Then the following resolutions were passed:

> (2) That the capital of the company be reduced from £750,000 divided into 390,000 8 per cent. cumulative preference shares, 120,000 10 per cent. cumulative preference shares, and 240,000 ordinary shares all of £1 each, to £676,666 13*s.* 4*d.* divided into 380,000 8 per cent. cumulative preference shares of 16*s.* 8*d.* each, 120,000 10 per cent. cumulative preference shares of £1 each, and 240,000 ordinary shares of £1 each, and that such reduction be effected (i) by returning to the holders of the 380,000 8 per cent. cumulative preference shares of £1 each which have been issued and are fully paid up capital to the extent of 3*s.* 4*d.* per share (being paid up capital in excess of the wants of the company), and by reducing the nominal amount of each of the said 380,000 issued 8 per cent. cumulative preference shares from £1 to 16*s.* 8*d.*, (ii) by cancelling the 10,000 8 per cent. cumulative preference shares . . . That upon such reduction of capital taking effect the capital of the company be increased to £750,000 by the creation of 88,000 new shares of 16*s.* 8*d.* each, and that there be attached to the said 88,000 new shares of 16*s.* 8*d.* each and to the existing 380,000 8 per cent. cumulative preference shares (which said 88,000 and 380,000 shares shall be known as and called "A" cumulative participating preference shares) and to the existing 10 per cent. cumulative preference shares (which said shares shall be known as and called "B" cumulative participating preference shares), and to the ordinary shares in the capital of the company the rights as to dividend and on a winding up following, that is to say: The profits of the company which it shall from time to time be determined to distribute by way of dividend shall be applied . . . Thirdly, the balance of such profits shall be distributed as to 25 per cent. thereof to the holders of the "A" cumulative participating preference shares and to the holders of the "B" cumulative participating preference shares *pari passu* as if the same constituted one class of shares and according to the amounts paid up on such shares held by them respectively, and as to 75 per cent. thereof to the holders of the ordinary shares according to the amounts paid up on such shares held by them respectively . . . In the event of the company being wound up the surplus assets available for distribution amongst the members shall be applied: (i) in paying to the holders of the "A" cumulative participating preference shares then issued and outstanding the amounts for the time being paid up on such shares held by them respectively . . .

I need not read the rest of that resolution. Then there is a resolution in regard to the "B" shares, which I need not read, and there is a resolution in regard to paying the holders of the ordinary shares. Then it was resolved as follows:

> Fourthly, the balance, if any, shall be distributed among the holders of the ordinary shares in proportion to the amounts paid up on such shares held by them respectively.

Then in 1937 it was decided that a reconstruction was desirable in accordance with the terms of a scheme of arrangement, and, under the document containing the scheme, which was duly passed between the company and the holders of the "A" and the "B" cumulative participating preference shares and the ordinary shares, there was an introductory part stating the existing position in regard to the numbers issued and held, and it recited in para. 5 of that introductory part that the

> . . . holders of the 6 per cent. "A" cumulative participating preference shares are entitled on a winding up in priority to all other shares to repayment of the capital paid up or deemed to be paid up thereon together with any arrears or deficiency of the fixed cumulative preferential dividend on such shares calculated down to the date of the commencement of the winding up . . .

Then para. 8 said that the fixed preferential dividend on the 380,001 issued 6 per cent. "A" shares, and the fixed preferential dividend on the 7½ per cent. "B" cumulative participating preference shares was in arrear. I will just mention that the figure of 380,001 was due to the fact that the 380,000, to which I have already referred in reading the previous resolutions, remained, and that one only of the additional 88,000 preference shares of that class had been issued.

Then comes the scheme. By the scheme, in para. (A), it is provided that all arrears of dividend on both classes of preference shares :

> . . . shall be cancelled and the capital of the company shall be reconstituted and rearranged so that the issued capital shall consist of 380,001 6 per cent. non-participating cumulative preference shares each of 10*s.* [instead of the 16*s.* 8*d.* which the "A" shares had at that time represented] ranking for dividend from Feb. 1, 1937 (which [10*s.* cumulative preference shares] will be retained by the holders of the present 6 per cent. "A" cumulative participating preference shares) [that is, the 380,001 shares] and 1,820,868 ordinary shares of 5s. each which will be held as to 791,668 by the holders of the 6 per cent. "A" cumulative participating preference shares, as to 626,177 by the holders of the present 7½ per cent. "B" cumulative participating preference shares and as to 403,023 by the holders of the present ordinary shares, and the unissued capital shall consist wholly of 5*s.* ordinary shares. Such reconstitution and rearrangement shall take effect as from the adoption of this scheme by the company and shall be effected by the following operations . . .

Of the "following operations" I do not think I need read any except (B), (C), (E) and (H). Para. (B) of the scheme provides as follows :

> Each of the issued 380,001 6 per cent. "A" cumulative participating preference shares shall be subdivided into one 6 per cent. cumulative preference share of 10*s.*, one share of 5*s.* and one share of 1*s.* 8*d.* The shares of 1*s.* 8*d.* each resulting from this subdivision shall be consolidated into 5*s.* shares.

To put it into different language, that meant that each £1 preference share was to be reduced to a preference share of 10*s.*, other things being equal, plus one and one-third 5*s.* shares, so that 3 preference shares would command 4 of these additional shares, as well as the 3 rights of 10*s.* on each of the cumulative preference shares. Then the "B" shares, by para. (C), were to be subdivided into 4 shares of 5*s.* each, and each of those 5*s.* shares was to be converted into ordinary shares. Then para. (E) provides as follows :

> All the issued capital except the said 380,001 10*s.* 6 per cent. cumulative preference shares shall be consolidated into a single class of ordinary shares and all the unissued capital shall be consolidated and subdivided into a single class of 5s. ordinary shares.

Thus, although the shares in para. (B) which were to be attached to each of the cumulative preference shares of 10*s*. were only called " shares " there, they were going to become ordinary shares. Then para. (H) provides as follows :

> A The articles of association of the company shall be amended as follows : (i) an article shall be inserted after art. 2 [the definition article] in the following terms : " 2 A (*a*) The authorised capital of the company is £750,000 consisting of 380,001 6 per cent. cumulative preference shares each of 10*s*. and 2,239,998 ordinary shares of 5*s*. . . . "

The whole of the preference shares had been issued, and the number I have already mentioned—namely, 1,820,868 ordinary shares—had already been issued. B Then para. (H) continues as follows :

> " . . . (*b*) The 6 per cent. cumulative preference shares shall as from Feb. 1, 1937, up to Jan. 31, 1939 [two years], carry the right to receive out of any profits which it shall be determined to distribute a non-cumulative preferential dividend at the rate of 6 per cent. per annum and from and after Feb. 1, 1939, shall carry the right to a fixed cumulative preferential dividend at the rate of 6 per cent. per C annum on the amount credited as paid up thereon and in the event of a winding up to repayment of the capital credited as paid up thereon and to all arrears (if any) of the said cumulative preferential dividend accrued due to the date of such winding up whether the same shall have been declared or not and whether or not profits have been made out of which such dividend could have been declared but such shares shall not carry the right to any further participation in profits or assets.

D The question in this case turns upon an interpretation of the previous resolutions in 1933 and of this scheme, including the amended articles which are covered by para. (H) of the scheme. Under the Companies Act, 1929, s. 10 (2), it is provided that any alteration or addition made by special resolution shall :

> E . . . subject to the provisions of this Act, be as valid as if originally contained therein [that is, in the articles of association] and be subject in like manner to alteration by special resolution.

The effect of that is that the special resolutions so passed operate as an amendment of the articles of association, and, for that reason, by F sect. 118 (2) of the Act, a copy of every such resolution is to be annexed to every copy of the articles issued after the passing of the resolution. Therefore, when the scheme of arrangement was adopted on that day, and also before its adoption, those resolutions of 1933 were a part of the articles, and the scheme must, therefore, be interpreted on the principle G that it is to be applied to the articles as incorporating those provisions contained in the special resolutions of 1933. The first principle which seems to me to be applicable is that in a scheme of arrangement and reconstruction it is not right to imply an alteration of existing rights of any class of shareholders unless the words compel that implication. H If an express alteration is made, *cadit quaestio*, but, if an express alteration is not made, then it ought not to be implied unless, taking as a whole the language of all the relevant provisions in the scheme and the articles, the court is obliged to come to the conclusion that that is clearly intended. That is a principle of our law which is of general application, and it is frequently applied to the interpretation of statutes, and particularly so in regard to taxing statutes, but there is no special rule about the taxing statutes which really differs, except from the point of view of the subject-matter, from the general rule, and that general rule applies here. At the moment before this scheme was adopted, it is quite clear that the preference shareholders in question had an absolute right in a winding up to priority over the ordinary shareholders in respect of repayment of their capital, and, unless the words are sufficient to take away that right, it is our duty to construe the alterations made by the scheme of arrangement at that time as not taking them away at all. It is argued that cl. H, para. (*b*), of the scheme ought to be construed as taking them away. In my opinion, that argument is fallacious, on the ground that there is nothing in the words of that particular para. (*b*), or in anything contained in the document which is called the scheme of arrangement, or in the scheme itself, which compels that interpretation, an interpretation which, in itself, would seem to me to be, from a business point of view, a most improbable change for the preference shareholders to have accepted. The words upon which counsel for the ordinary shareholders chiefly relies are the words in the latter half of that para. (*b*). In order to appreciate the latter half of para. (*b*), I will read again the first half of it :

> The 6 per cent. cumulative preference shares shall as from Feb. 1, 1937, up to Jan. 31, 1939, carry [certain dividend rights] and after Feb. 1, 1939, shall carry the right to a fixed cumulative preferential dividend at the rate of 6 per cent. per annum on the amount credited as paid up thereon [that is, the 10*s*.] and in the event of a winding up to repayment of the capital credited as paid up thereon and to all arrears (if any) of the said cumulative preferential dividend accrued due to the date of such winding up . . . but such shares shall not carry the right to any further participation in profits or assets.

Counsel for the ordinary shareholders contends that those last words which I have just read—namely, " shall not carry the right to any further participation in profits or assets "—ought to be interpreted as taking from those shareholders the right to priority over the ordinary shareholders in winding up which had been expressly given to them before. In my view, it is quite impossible to attach that meaning to those words without wholly contravening the ordinary principle of interpretation to which I have referred. Indeed, I go further. The position is not a purely neutral position as regards the language used, because the earlier words, to my mind, indicate a presupposition to be kept in mind in construing the last words—namely, that, in the event of a winding up, those shares are entitled to repayment of the capital credited, and, therefore, in my view that must be assumed to have been achieved before it shall be said to the preference shareholders : " You should not have any further participation in profits or assets."

The judge did not, if I may respectfully say so, take into account what may be regarded as almost a presumption in principles of interpretation analogous to onus of proof in a question of evidence. He did not mention the presumption that the rights should not be interpreted as taken away or impaired unless the language either creates that effect or necessarily, on consideration of the whole document, compels that interpretation. In my view, there is nothing at all in that provision in the scheme of arrangement to take away the existing rights of the former £1 preference shareholders, which rights were reduced to a 10*s.* preference share plus one and one-third ordinary shares. Indeed, there are provisions which I did not think it necessary to read but which would have had the result of putting such shareholders into a position in regard to their one and one-third ordinary shares which might in certain events be worse than that of the present ordinary shareholders. For those reasons, I think that the judgment below must be reversed and a declaration made that the preference shareholders, as they are to-day, are entitled in the winding up to be paid their 10*s.* in priority to the ordinary shareholders.

Appeal allowed. Declaration that the existing preference shareholders are entitled in the winding up to be paid their 10*s. in priority to the ordinary shareholders.*

Solicitors: *Robinson & Bradley*, agents for *Harding & Barnett*, Leicester (for the appellant); *Field, Roscoe & Co.*, agents for *Whetstone & Frost*, Leicester (for the respondents); *Kingsford, Dorman & Co.*, agents for *Harvey, Clarke & Adams*, Leicester (for the liquidator).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

THORNTON *v.* MITCHELL.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Hilbery, JJ.), **January 17, 1940.**]

Street Traffic—Summary jurisdiction—Motor-omnibus driver charged with driving without due care and attention and charge dismissed—Conductor of same vehicle charged with aiding and abetting offence alleged against driver—Conductor convicted—Validity of conviction—Road Traffic Act, 1930 (*c.* 43), *s.* 12 (1).

A motor-omnibus driver was charged under the Road Traffic Act, 1930, s. 12 (1), with driving a motor omnibus without due care and attention, and with driving without reasonable consideration for other persons using the road. The conductor of the same omnibus was charged under the Summary Jurisdiction Act, 1848, s. 5, with aiding and abetting the offences alleged against the driver. On the hearing before the magistrates, it was found that the omnibus was being reversed, and that, as the driver could not see the road behind him, it was the duty of the conductor to signal that the road was clear. The conductor gave the signal when in fact there were two pedestrians behind the omnibus, and these were knocked down and one fatally injured. The magistrates dismissed both charges against the driver, but convicted the conductor on the first of the charges against him and dismissed the second. The conductor appealed:—

Held: the conductor could not be convicted of aiding and abetting the principal in what the principal was not doing, and he could not be convicted as principal, because, on the particular words of sect. 12 (1) of the Act of 1930, only the driver could be guilty of the principal offence.

[**EDITORIAL NOTE.** Only the person who is driving a vehicle can be convicted of driving without due care and attention under the Road Traffic Act, 1930, s. 12 (1). Here, where an accident was caused by the carelessness of the conductor of an omnibus, an attempt was made to convict him of aiding and abetting the driver in committing the offence under sect. 12 (1). As the driver was acquitted, however, it was impossible to convict the conductor of aiding and abetting.

AS TO CARELESS DRIVING, see HALSBURY, Hailsham Edn., Vol. 31, p. 672, paras. 987, 988; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 222a-222p.]

Case referred to:

(1) *Morris* v. *Tolman*, [1923] 1 K.B. 166; 14 Digest 92, *612*; 92 L.J.K.B. 215; 128 L.T. 118.

APPEAL by the conductor by way of case stated from a decision of a court of summary jurisdiction sitting at Rochdale, whereby the conductor of an omnibus was convicted of having aided and abetted the driver of the omnibus in driving without due care and attention and without using reasonable consideration for others using the road. The charges against the driver were dismissed. On the hearing of the information, the following facts were proved or admitted. On Mar. 18, 1939, the omnibus arrived at a road junction where all the passengers disembarked. Before the omnibus reversed, the conductor looked out of the back to see if the road was clear. Then he rang the bell three times as a signal to the driver to reverse. At the time when he gave the signal, the conductor, following his usual practice, was standing on the platform at the back of the omnibus. The time was about 7.45 p.m., and the visibility was poor. After giving the signal, the conductor jumped off the omnibus, which was reversed slowly. Two persons who had just disembarked were knocked down by the back of the omnibus as it was reversing, and one of them received fatal injuries. The driver could not see any person immediately behind the omnibus while he was reversing, owing to the obstruction caused by the steps to the upper deck, and owing to the height of the window at the back, and he had, therefore, to rely upon the conductor's signal.

G. H. Oliver for the appellant.

Ralph H. Etherton for the respondent.

LORD HEWART, L.C.J.: In my opinion, it is quite clear that this appeal must be allowed. Informations were preferred by the respondent, a superintendent of police, against a certain motor driver, one Hollinrake, for driving a motor vehicle—that is to say, an omnibus—without due care and attention, contrary to the Road Traffic Act, 1930, s. 12 (1), and also against the same driver for driving a motor vehicle—that is to say, a motor omnibus—without reasonable consideration for other persons using the road. At the same time, the bus conductor was charged as an aider and abettor. The information alleged that Hollinrake did unlawfully drive the motor vehicle without due care and attention, and that the present appellant, who was a bus conductor, unlawfully did aid, abet, counsel and procure Hollinrake to do and commit that offence. There was a further charge against the bus conductor under the second information, whereby the driver was charged with driving "without reasonable consideration for other persons using the road." In the result, the justices dismissed the two charges against the driver, but convicted the appellant of unlawfully aiding, abetting, counselling and procuring the driver to do and commit the offence of driving without due care and attention, contrary to sect. 12 (1). They say in para. 8:

> We, being of opinion that the conductor [had been very negligent], held that he was guilty of aiding and abetting, counselling and procuring the said Hollinrake to drive without due care and attention, and accordingly we inflicted a fine.

In my opinion, this case is *a fortiori* upon *Morris* v. *Tolman* (1), to which our attention has been directed. I will read one sentence from the judgment of AVORY, J., at p. 171:

> . . . in order to convict, it would be necessary to show that the respondent was aiding the principal, but a person cannot aid another in doing something which that other has not done.

That, I think, is the very thing which these justices have decided that this bus conductor did. In one breath they say that the principal did nothing which he should not have done, and in the next breath they hold that the bus conductor aided and abetted the driver in doing something which had not been done or in not doing something which he ought to have done. I really think that, with all respect to the ingenuity of counsel for the respondent, the case is too plain for argument, and this appeal must be allowed and the conviction quashed.

HUMPHREYS, J.: I agree, and I have nothing to add.

HILBERY, J.: I agree.

Appeal allowed with costs. Conviction quashed.

Solicitors: *Pattinson & Brewer*, agents for *J. Bright Clegg & Son*, Rochdale (for the appellant); *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, Preston (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

REDDITCH BENEFIT BUILDING SOCIETY *v.* ROBERTS.

[Court of Appeal (Scott, Clauson and Luxmoore, L.JJ.), **January 22, 26, 1940.**]

Practice—Appearance not entered within prescribed time—Application for leave to enter judgment in default—Judgment entered notwithstanding defendant's appearance at hearing of application.

Practice—Writ by mortgagee claiming payment and possession—Form of order—R.S.C., Ord. 55, *r.* 8a.

A building society took proceedings against a mortgagor to recover the amount of the mortgage debt and possession of the property. The defendant failed to enter an appearance within the prescribed time, but subsequently appeared before the registrar on an application by the building society for leave to enter judgment in default of appearance, and then intimated his desire to enter an appearance. The registrar, notwithstanding that the defendant was represented before him, ordered that judgment should be entered in default of appearance, but should be suspended for 14 days in order that the defendant's case might be investigated to ascertain whether there was a *bona fide* defence to the claim. The judgment given was simply a judgment for payment and possession. A motion brought before the court to discharge the registrar's order was dismissed :—

Held : (i) judgment ought not to be entered in default of appearance when the defendant is before the court, and, whether he has technically appeared or not, is present and anxious to put himself in a position to defend the action.

(ii) the judgment as entered, being simply for payment and possession, did not comply with the form prescribed by Ord. 55, r. 8a.

[**EDITORIAL NOTE.** The present case deals purely with a practice point, but it is important as including a full consideration of the reasons for, and the nature of, the change recently made in the procedure on a claim for possession by a mortgagee. This change was made by the amendment of the rules of court by the addition of R.S.C., Ord. 55, r. 8a, and the judgment herein should do much to help practitioners proceeding under that rule.

As to Appearance, see HALSBURY, Hailsham Edn., Vol. 26, pp. 37-40, paras. 54-62 ; and for Cases, see DIGEST, Practice, pp. 376-384, Nos. 856-917. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 1159.]

Appeal by the defendant from the order of Hallett, J., dated Sept. 20, 1939, refusing an application for leave to enter an appearance after the time prescribed had expired. The facts are fully set out in the judgment of the court delivered by Clauson, L.J. An application to enter appearance was made on the morning on which the respondent society was applying at the district registry for judgment to be entered in default of appearance. The writ was a specially indorsed writ, and was issued on June 22, 1939, and the application to enter appearance was made at the district registry on Aug. 25, 1939. The application was refused.

G. Granville Slack for the appellant.

Herbert L. A. Hart for the respondent society.

Slack : Under R.S.C., Ord. 12, r. 22, a defendant is entitled to appear at any time before judgment. The appellant should have been allowed to enter an appearance in the present case.

Hart: If the court takes the view that any injustice has been done to the appellant, the respondents are quite prepared to allow the order to be discharged and the matter remitted to the registrar.

CLAUSON, L.J. [delivering the judgment of the court]: This is a
A most unfortunate case, in which, as sometimes happens, a series of errors, each quite explicable, might have resulted in serious injustice being done. However, we are glad to think that, with the assistance of counsel and the registrar of the district registry in which the matter originated, it is possible to deal with it in such a way that no evil conse-
B quences will ensue.

The plaintiffs issued a writ in the Birmingham District Registry claiming repayment of a sum of between £400 and £500 for principal and interest due under a mortgage, and so forth, and possession of the mortgaged property. The defendant, who was living in Middlesex,
C had executed an ordinary building society mortgage. The writ was served in the usual way. The time for appearance expired without the defendant having entered an appearance, and in due course the plaintiffs proceeded with the usual application for leave to have judgment for payment and possession. I say the usual application, because,
D as the rules now stand, and have stood for nearly 3 years, in an action of this kind judgment in default of appearance cannot be entered without the leave of the master, or, in the district registry, of the district registrar.

For reasons which are not material, the defendant had not, as I say,
E entered appearance within the time prescribed, but he did receive notice, as is now required by the rules, that this application for leave to enter judgment in default of appearance was coming before the district registrar on a certain day. On the morning of that day, some attempt was made to enter an appearance, but it was stated that there was a
F summons then coming on before the registrar and that the matter had better be put before him.

We have had the advantage of hearing from the registrar what happened, and it appears that, when the summons was before him, the defendant's representative did appear, and did intimate his desire to
G put himself in order in regard to entering an appearance with a view to avoiding judgment going by default, and with a view in due course, no doubt, to obtaining time to put in a defence, and so forth. I gather that the representative of the defendant was perhaps not very much versed in all the technical details of Chancery procedure. It is not
H necessary to consider exactly what was said on one side or the other. What seems to have happened is that the registrar thought that the best thing to be done was for the defendant's representative to ascertain from his client what was the real defence to the action, and what was the real point about which he was going to argue. The registrar thought that the most convenient way of dealing with that matter was to give

judgment in default, but to suspend it for a time—whether 7 or 14 days it is not quite clear, and it is quite immaterial—on the understanding, apparently, that the defendant's representative was to get instructions, and, if he got instructions which satisfied him that there really was something to fight about, and that the thing ought to be fought, he would then take some step, either by mentioning the matter to the registrar or by applying for extension of time, to put in a defence, or whatever might turn out to be the right procedure to put the matter in order.

It was for that reason that the registrar let judgment go as in default of appearance, notwithstanding that, as a matter of fact, there was a representative of the defendant before him who was anxious to put himself right with the court by entering an appearance. With the greatest respect to the registrar, who, I think, made the order he did make with the best intention, because he thought it was a practical way of bringing the thing to a head, it really was not the right order to make, because a judgment ought never to go in default of appearance when the defendant is before the court and, whether he has technically appeared or not, is there and anxious to put himself in a position to defend. I think that it was quite wrong to enter the judgment as a judgment in default of appearance. As I say, in the normal way I do not know that it would have mattered very much, and I think that the registrar was actuated by a most commendable wish to put the matter on a practical footing, so that, if there really were no defence, no further expense would be incurred by the defendant, while, if there were a defence, having regard to the fact that the order was suspended for 7 or 14 days, there was every opportunity of getting things straight. However, we take the view that that order, entered in those circumstances, is an irregular order, because it proceeds in default of appearance, which is not in accord with the real fact—namely, that the man was attempting to put himself before the court. Accordingly, we see no ground upon which that order can be supported, and it must be discharged.

It appears that there was a motion before the vacation judge to discharge the registrar's order. Unfortunately, counsel who moved the motion is not now before the court, and counsel for the then respondent did not reach the vacation judge's court until matters had already proceeded a certain way, and some obscurity I think still lurks round the reasons which induced Hallett, J., to leave the order standing. I do not think that it can have been put to him in the way which we envisage—namely, that it was a case of allowing an order to go in default of appearance when there was not really default. Anyway, he refused to interfere with the registrar's order, and the matter now comes before us on appeal from his decision.

When the matter came before us and we proceeded to investigate it, another feature of a somewhat alarming character emerged. In order to explain that, I must go back historically for about 3 years. Until about 3 years ago, there were two methods of enforcing mortgages of this character. One was by originating summons in the Chancery Division in London, but that procedure did not apply in the ordinary district registry. I say ordinary, because I omit Liverpool and Manchester. There was that procedure, and there was also the procedure of issuing a writ claiming the appropriate relief and obtaining, usually in the King's Bench Division, a judgment for payment and possession, either in default or under the appropriate rules dealing with summary applications for judgment.

Those whose business it is to see that the procedure of the court is in accordance with what is right and proper were rather perturbed by finding that, whereas on an originating summons the facts and the circumstances of the case were brought before the court, and in proper cases the wind was tempered to the shorn lamb, time given for payment, and so forth, in cases where relief was claimed by the issue of a writ in the King's Bench Division the relief was obtained automatically, without the matter coming before any judicial officer. Further than that, it had been the practice—a practice which dates back to the period before the Judicature Act—to give the judgment in the form appropriate in the courts of common law, which had no regard in this matter to the equitable principles governing the relations of mortgagor and mortgagee. Judgments were given in the form of a clean judgment for payment and possession, leaving it to the defendant, by appropriate proceedings in equity, to establish the rights which would flow from his action if he in fact paid the debt. Accordingly, a defendant who found himself served with a judgment of that kind would, on the face of it, see that he was under an obligation to give up possession and to pay, and at all events he would not have it brought to his attention that, upon payment, by taking the proper proceedings in the proper court, he would be entitled to a certain relief in respect of his position as a mortgagor.

It was for that reason that, about 3 years ago, by rules of court it was laid down that certain forms of order were to be used in the case of orders made on originating summons for relief of such character as is usually required in the case of mortgages of this type, and for the first time the jurisdiction on originating summons was extended so as to enable the court on the originating summons to give, not only the usual equitable relief, but also judgment for payment of the debt. That step had the result that all the rights of the mortgagor and the mortgagee under a mortgage of this kind could be dealt with on originating summons.

Further, at the same time it was thought convenient that the method of obtaining judgment automatically, if I may so express it, when a writ has been issued in the King's Bench Division ought not to continue, and it was decided to make arrangements that all actions of this type should be brought, not in the King's Bench Division, but in the Chancery Division, and that, where an action had been commenced by writ, the defendant should be given the same protection in the case of an application for summary judgment in that action as that to which he would have been entitled if the application had been made by originating summons. In particular, a rule was made—it is R.S.C., Ord. 55, r. 8A—under which, in the case of an action commenced by writ, the forms Nos. 38, 39 and 40 in Appendix L to the Rules of the Supreme Court, which were prescribed for the originating summons procedure, should be used in the case of actions commenced by writ.

When we went into the matter, we found that the judgment which had been given in default of appearance in this particular case was not in the form which complied with the rules, but was in the old pre-Judicature Act form. It was simply judgment for payment and possession. With the registrar, we have inquired into the matter, and we have had information properly given on behalf of the building society by their counsel, and it seems clear that there has been, as I say, an unfortunate series of blunders.

The district registrar ought never to have allowed the order to go in the form in which it did, and that appears to be due not so much to the fact that the district registrar was ignorant of the rules and the forms, as to the fact that the necessary information as to the right form to use somehow did not seem to have found its way to the clerk whose business it is in the registry to check the order. It would also appear that there had been some misunderstanding in some previous case about the form of order. That was suggested to us by counsel for the building society, and I have not the least doubt that the suggestion was not made without some foundation. However, the blunder, if blunder it was, was certainly not made by the district registrar whom we have with us now, but by another district registrar. It would be unfair to say anything further about it without investigating the circumstances, and I do not think that it is worth investigating the matter.

he fact remains that a blunder was made in allowing the order to go in the form in which it did. Accordingly, on that ground too, even if there had not been the difficulty as to the order being in default of appearance where a defendant had *bona fide* tried to appear, we should have found it necessary to discharge the order, if only on the ground that it does not comply in its form with the rules. Accordingly, the order which we propose to make is this. The order of the vacation judge refusing to interfere with the order of the district registrar will be discharged. The judgment in default of appearance given by the district registrar will also be discharged. It will not be necessary to intimate that leave is given to the defendant to enter an appearance. If he has not already done so—it may be that he has, I do not know—he will, of course, in the ordinary way, do so. Anyway, he will find no difficulty this time in getting his appearance accepted in the district registry. I think that there must be an undertaking by counsel for the defendant to enter appearance, because it is on that footing that he is before the court.

Solicitors: *Stanley Moore & Partners* (for the appellant); *Long & Gardiner* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re JAMES MILLWARD & CO., LTD.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **January 23, 1940.**]

Companies—Winding up—Company in voluntary liquidation—Right of judgment creditor to compulsory winding up order—Ex debito justitiæ—Companies Act, 1929 (*c.* 23), *s.* 255.

Under the Companies Act, 1929, s. 255, a judgment creditor of a company in voluntary liquidation is entitled *ex debito justitiæ* to an order for the compulsory winding up of the company.

[**EDITORIAL NOTE.** It has generally been understood that the Act of 1929 extended the rights of a judgment creditor in this matter and gave him an absolute right to a compulsory order. The Court of Appeal have confirmed this view, but it was not accepted in the court of first instance.

AS TO RIGHT OF CREDITOR TO COMPULSORY ORDER, see HALSBURY, Hailsham Edn., Vol. 5, p. 551, para. 889; and FOR CASES, see DIGEST, Vol. 10, pp. 831, 832, Nos. 5419-5424.]

APPEAL by a judgment creditor from an order of BENNETT, J., dated Oct. 20, 1939, dismissing a petition for the compulsory winding up of the respondent company. The petitioner, the present appellant, on Nov. 28, 1938, commenced an action against the company, and on July 24, 1939, recovered judgment for £5,500 damages and £104 6*s.* 6*d.* costs. On July 31 it was decided that the company should be wound up. There were three creditors for a total sum of about £1,600 as against the debt of some £5,600 due to the petitioner. The company were hopelessly insolvent.

The Companies Act, 1929, s. 255 is as follows:

> The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the court, but in the case of an application by a contributory, the court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.

J. A. Wolfe (for *E. Milner Holland*, on war service) for the appellant.

Morris Smith (*Raymond Jennings* with him) for the respondents.

Wolfe: The petitioning creditor has obtained judgment, and has not been paid. He is entitled to a compulsory winding up order. [He was stopped by the court.]

Smith: In BUCKLEY ON COMPANIES, 11th Edn., p. 509, there is a statement which seems to show that there is some doubt on the matter in the case of a creditors' winding up. It does not say that a creditor shall be in the same position notwithstanding a voluntary winding up. It says that a creditor cannot be stopped by showing that there is a voluntary winding up. So far as I am aware, no reported case deals with the point.

SCOTT, L.J.: In this case, the judge has refused to make an order for the compulsory winding up of a company which was already in voluntary liquidation when the petition for compulsory winding up was lodged by a creditor. The present Act has altered the law in regard to the burden of proof which must be met by a creditor who desires a compulsory order for winding up when there is a voluntary liquidation already in progress. He used to have to show that the position of the creditor would be prejudiced in some way. Otherwise he did not get the compulsory order. The present Act, by sect. 255, explicitly and without any ambiguity whatever, removes that burden of proof, and leaves the position such that the creditor is entitled *ex debito justitiæ* to an order. It may be that I have overstated the burden upon the creditor, even under the previous legislation. The general principle undoubtedly was that the creditor was entitled *ex debito justitiæ* to his order, but there is no doubt that the Act has made a difference in the respect of what he has to show. As it stands to-day, he has not to prove any further facts than that he has obtained his judgment debt, that his debt has not been satisfied, and that he desires a compulsory winding up. The judge (I speak with some hesitation), I think, must have been misled into thinking that the creditor had to show prejudice if the winding up on voluntary lines was allowed to continue, by reason of the statements in his affidavit that he would suffer some prejudice. Had the position been that he had to prove real prejudice, I should have agreed with the judge's view that his affidavit did not show very strong prejudice. I am not sure that I should not, even under the old law, have taken the same view in the ultimate result. However, be that as it may, the fact that some allegations of a rather unsubstantial kind were unnecessarily included in his affidavit does not deprive him of the right *ex debito justitiæ* which he has to-day, just as a judgment creditor serving a bankruptcy notice is entitled to have an order made by the Bankruptcy Court. The same principle underlies both, and gives to the creditor the same kind of remedy in a particular form of judicial execution, whether the debtor is an individual person or a company. The appeal, therefore, must be allowed, with costs here and below.

CLAUSON, L.J.: I agree. I would desire to add only this. In a case like this, where the onus is on those who are opposing the winding up, for myself I would place but little reliance upon the affidavit of a liquidator, however eminent or however respectable, who filed evidence founded entirely, or almost entirely, on information and belief. Where the onus is on those who are opposing the winding up petition, I should very much hesitate to regard the onus as discharged in a case where those who must necessarily be conversant with the whole matter—namely, the directors—do not put in any affidavit, and are, therefore, shielded from cross-examination. That is all I wish to add.

A LUXMOORE, L.J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *Waller, Neale & Houlston* (for the appellant); *Woolfe & Woolfe* (for the respondents).

B [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

YOUNGS *v.* YOUNGS (BAKER CLAIMANT).

C [COURT OF APPEAL (Slesser, MacKinnon and Goddard, L.JJ.), **January 30, 1940.**]

Bills of Sale—Receipts on sale of furniture—Unregistered—Whether goods in possession or apparent possession of grantee—Sale to housekeeper residing on the premises—Bills of Sale Act, 1878 (*c.* 31), *ss.* 4, 8.

D The petitioner in a divorce suit obtained an order against her husband for alimony *pendente lite*, and a claim in respect of this order being unsatisfied, on June 30, 1939, a writ of *fieri facias* was issued, and, *inter alia*, certain furniture was seized by the sheriff thereunder. The claimant thereupon alleged that the furniture was her property and had been wrongfully seized by the sheriff. On Mar. 2, 1939, the husband had sold part, and on June 18, 1939, the balance, of this furniture to the claimant, who was then, and continued to be, his housekeeper. The E sale was, in each case, evidenced by a receipt for the money signed by the husband. After the sale, the furniture remained in his house and he and his daughter continued to use it as they had formerly done, the claimant using it only in so far as she was in the house, and was a member of the household. The county court judge held on the evidence that the receipts were intended to be part of the transactions, and, therefore, F constituted bills of sale within the meaning of the Bills of Sale Act, 1878, s. 4. These receipts were not registered in accordance with sect. 8, but it was contended by the claimant, in reliance upon *Ramsay* v. *Margrett* (1), that they were in her possession, and so protected from seizure by the sheriff. The judge, however, found that there was no intention on the part of the husband to part with the possession of the furniture to the claimant:—

G HELD: (i) the receipts were intended to be part of the transaction, and, therefore, constituted bills of sale within the Bills of Sale Act, 1878, s. 4.

(ii) the husband had not parted with the possession of the furniture. The principle of *Ramsay* v. *Margrett* (1) does not apply simply because there is a marriage tie, and it does not have any bearing where the transaction is between a man and his domestic servant and the latter H has the use of the goods only as a servant.

[**EDITORIAL NOTE.** The decision herein sets a definite limit to the principle enunciated in *Ramsay* v. *Margrett* (1). The possession of goods may pass from one person to another in the same house provided they each have an equal use of the goods. That is not the case, however, where one uses them as a master and the other uses them as a servant. It must be particularly noted that the decision herein turns upon the finding of fact that the housekeeper had the use of the goods only as a servant.

As to Apparent Possession, see HALSBURY, Hailsham Edn., Vol. 3, pp. 65-67, paras. 110-112; and for Cases, see DIGEST, Vol. 7, pp. 110-118, Nos. 649-685.]

Cases referred to:

(1) *Ramsay* v. *Margrett,* [1894] 2 Q.B. 18; 21 Digest 499, *740*; 63 L.J.Q.B. 513; 70 L.T. 788.

(2) *French* v. *Gething,* [1922] 1 K.B. 236; 21 Digest 499, *741*; *sub nom. French* v. *Gething, Gething Claimant,* 91 L.J.K.B. 276; 126 L.T. 394.

(3) *Antoniadi* v. *Smith,* [1901] 2 K.B. 589; 7 Digest 115, *675*; 70 L.J.K.B. 869; 85 L.T. 200.

Appeal by the claimant from a judgment and order made by His Honour Judge Drucquer at Willesden County Court on Sept. 29, 1939. The facts are fully stated in the judgment of Slesser, L.J.

H. E. Park for the appellant, the claimant.

Norman E. Wiggins for the respondent, the execution creditor.

Park: On the authority of *Ramsay* v. *Margrett* (1) and *French* v. *Gething* (2), it cannot be said that the furniture was in the apparent possession of the defendant. The law attributes the possession to the person who has the legal title, whether the property is real or personal. These were not bills of sale. If a document is intended by the parties to be a part of the bargain to pass the property in the goods, it is a bill of sale whatever its form; but if it is not so intended, and the bargain is complete without it, so that the property passes independently of it, then it is not to be deemed a bill of sale: *Ramsay's* case (1).

Wiggins: The receipts were a bill of sale within the Bills of Sale Act, 1878, s. 4. The goods remained in the apparent possession of the grantor of the bills, and the bills, not having been registered, are, under sect. 8, void as against the execution creditor.

Slesser, L.J.: In this appeal, Mrs. Belinda Youngs, who was the petitioner in a divorce suit against her husband, Walter Cyril Youngs, on Apr. 24, 1939, obtained an order for alimony, and in respect of that order she had a claim against her husband. This claim being unsatisfied, goods and chattels were seized by the sheriff of the county of Middlesex under a writ of *fieri facias.* The goods consisted, amongst other things, of certain furniture worth, it is said, respectively £50 10*s.* and £39. The claimant, Miss I. M. P. Baker, said that the sheriff wrongfully seized those goods, in that they were her property, and an interpleader issue was directed to determine that question.

The facts of the case are that the claimant had been employed until Dec., 1937, partly as a domestic servant at the home of the judgment debtor Walter Cyril Youngs and his wife, who were then living together, and partly as an assistant in a shop conducted by them. In Feb., 1938, the wife left the husband, and, later in that year, their young daughter returned to him, and, at the same time, the claimant returned and acted as the husband's housekeeper.

In Mar., 1939, the husband got into financial difficulties, and said that he wanted to sell his furniture. The claimant thereupon bought his furniture for the two sums which I have mentioned, on Mar. 2, 1939, as to £50 10*s*., and on June 18, 1939, as to £39 for the second lot of furniture. It is suggested that the purchase of that furniture by the claimant was not a genuine purchase, and evidence was given as to the borrowing by her of certain moneys from friends to buy the furniture. The judge has come to the conclusion that the claimant did buy the furniture from the husband for the sums and on the dates mentioned, and that, in his opinion, they were genuine transactions, and not done with intent to defraud the creditors within the meaning of the Law of Property Act, 1925, s. 172, and the case must be dealt with upon that basis.

What is said on behalf of the execution creditor, the wife, is this. It is said that this transaction constituted a bill of sale within the meaning of the Bills of Sale Act, 1878, s. 4, in that a bill of sale includes " an assurance of personal chattels " ; and that the taking of those receipts of Mar. 2, 1939, and June 18, 1939, both setting out the furniture bought, and both having this subscription : " Received " the respective sums " from I. M. P. Baker for the above effects," signed by the husband, constituted bills of sale. It is not seriously disputed that it was by reason of those receipts that this lady was willing to purchase these goods, that she received the necessary assurances of the personal chattels, and that the goods, therefore, were passed by the bills of sale. If it be the right view that those documents constitute bills of sale, it is conceded that they have not been registered, and, if they have not been registered, they are avoided as unregistered bills of sale as against the sheriff's officer and other persons seizing the goods under the Bills of Sale Act, 1878, s. 8, if after the lapse of seven days " they are in possession or apparent possession " of the person making such bills of sale.

It is said that these goods are not " in the possession or the apparent possession " of the person making the bill of sale. It is said that the right view is that they are in the apparent possession of the claimant. On that point we have been referred to *Ramsay* v. *Margrett* (1), which really follows the old principles of law on the general law of possession, namely, that, where the possession of goods may be in one person or another, and the matter of possession is doubtful, then the law will attribute possession to the person who has the legal title. However, such cases as *Ramsay* v. *Margrett* (1) and the later case of *French* v. *Gething* (2), which was also cited to us, are cases where it was doubtful, apart from the question of title, whether the possession was in the husband or in the wife. In a later case of *Antoniadi* v. *Smith* (3), a similar problem had arisen with regard to a son-in-law and a mother-in-law. However, the judge has found in the present case that there was no intention on the part of the husband to part with the possession of his furniture to the claimant, and, in my opinion, there is evidence on which he could come to that conclusion. The evidence consists in this. First, he has found that at all times the claimant was a domestic servant in the house. Though it might be possible to draw certain inferences against her morality (which I hesitate to do) owing to the fact that she was the woman with whom adultery was charged in the undefended divorce case, in which a decree was granted, nevertheless the judge has not found that she occupied that anomalous position, but has found that at all material times she was servant or housekeeper. Secondly, he has found that the furniture which is the subject-matter of these bills of sale, which has never been moved from the house, is still being used by the husband for himself and his daughter, and that the claimant uses the furniture only in so far as she is in the house as a member of the household. That is to say, being a servant or housekeeper, she does not use this furniture, which consists of the normal furniture of a house, the bedroom suite, the dining-room suite, bookcases, dining-trolleys and kitchen utensils, as of right, but as a servant. Therefore, this is not one of the cases where it is doubtful whether the apparent possession is in A or B, and where it is said that possession follows the title. It is a case where the judge has found as a fact that the apparent possession is in the execution debtor, the husband. If he has so found, then the matter falls sufficiently within the ambit of the Bills of Sale Act, 1878, s. 8. These being bills of sale and being unregistered, are void against the sheriff's officer, and it follows, therefore, that this appeal fails.

MacKinnon, L.J.: I agree. When the writ of *fieri facias* was issued, and execution put in by the wife, the sheriff's officers seized certain furniture. The claimant asserted that the furniture belonged to her. The judge found and is satisfied, that the husband did sell her the furniture by two sales on Mar. 2, 1939, and on June 18, 1939, as was shown by two receipts and invoices of those dates, signed by him. Then the execution creditor says: "Well, that may be so; but, if those facts are established, then I rely on the Bills of Sale Act, 1878, ss. 4, 8, and say those receipts constitute bills of sale, and they are not registered; and thus the chattels remain in the possession of the grantor of those bills of sale." In reply to that, the claimant seeks to rely on the principle laid down in *Ramsay* v. *Margrett* (1) as regards the first point, whether the document in question constituted a bill of sale within the definition of the Bills of Sale Act, 1878, s. 4. The gist of that decision is: If a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase money, it is, by sect. 4, to be deemed to be a bill of sale, though it is not so in fact. However, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale. In this case, as in *Ramsay* v. *Margrett* (1), the claimant argues that these documents fall into that second category, but the judge has found, in the terms of that distinction laid down in *Ramsay* v. *Margrett* (1):

> I came to the conclusion that the receipts were intended to be part of the transaction in passing the property.

And further:

> I came to the conclusion that the receipts in question were given as assurances of title.

There was ample evidence on which the county court judge could come to that conclusion. If so, on that head this case is the opposite to that which was decided in *Ramsay* v. *Margrett* (1).

The other point is whether the goods remained in possession of the grantor of these bills of sale. *Ramsay* v. *Margrett* (1) was the case of a sale by a husband to his wife, the husband and wife living together in the same house. As I understand it, it was held by the judges there, as was pointed out by Scrutton, L.J., in the later case of *French* v. *Gething* (2) at p. 245, that when a husband and wife are living together in a house, the furniture in the house is in the apparent possession of either or both of them. If it is in possession of both of them, or each of them; and if it is a question of whose property it is, one may have to go into the question of title to see who is really in possession, under the old doctrine which has been cited from Littleton on Tenures, s. 701. In this case there is nothing of that sort. These persons are living in the same house, but one is the owner and master of the house and the other, up to Sept., 1939, was, on her own evidence, in the house as housekeeper and servant, receiving £2 per week as wages. There is no more apparent possession of the furniture by her than there would be apparent possession of furniture in the house by any servant living permanently in the house. Therefore, *Ramsay* v. *Margrett* (1) is not a binding authority in this case. The county court judge was not bound to hold that this furniture was in the possession either of the husband or of the claimant, and he finds on the facts that the possession of the furniture never did leave the former. The furniture has never been moved from the house; it is still being used by the husband for himself and his daughter, and the claimant uses it only so far as she is a member of the household. The county court judge says:

> I was of opinion that possession of the furniture was not given by Mr. Youngs to the claimant.

In those circumstances, there was again a finding of fact for which there was evidence, and, on that, the county court judge held that the claimant's claim was unfounded. That being so, I think the appeal against his decision entirely fails.

GODDARD, L.J.: I agree. We have heard an interesting, and, if I may say so, an exceedingly well put argument by counsel for the claimant. It in no way detracts from the value of his argument if I say that I myself am glad that I cannot accede to it, because I cannot imagine any case in which it would be more proper that the Bills of Sale Act, 1878, should apply than in this case. It is just the sort of case which, in my opinion, illustrates the mischief which the Act was intended to prevent.

Two points have been taken. One under sect. 4 and one under sect. 8. With regard to sect. 4, it is said that this document, which consists of an inventory with a receipt attached, which therefore is deemed to be a bill of sale if it is a document which, on the authorities, was intended to be part of the transaction. In considering whether or not it was a bill of sale, the judge must, of course, look at the evidence. In this case, I should have thought that it was demonstrably clear that this document was intended by both parties—certainly by the grantor—to be an assurance of title to the claimant. It is quite clear from the husband's own evidence that what he was doing was either, on the most charitable view, raising money to pay his creditors, or, on the other view, wanting to put his furniture beyond the reach of his creditors. However, in either case, as he was selling to his housekeeper, the last thing that he would want would be that the sheriff should come in and take the property which had been in his house, and of which he was getting the use, although he had been paid £89 10*s*. by his housekeeper in respect of it. I am quite satisfied that he intended—and I have not the least doubt that the claimant also intended—that there should be a document created which would transfer the property to her, and which could be shown to any creditor who might come along, or to the sheriff if he came along, as showing that the property in the goods had been transferred to the claimant. There was ample evidence here, in my opinion, on which the county court judge could dispose of the point under sect. 4 as he has done.

As to the point under sect. 8, I loyally accept the decision in *Ramsay* v. *Margrett* (1), and that in *French* v. *Gething* (2), which approved the decision in *Ramsay* v. *Margrett* (1). I think that one may say that the result of those cases is that, when a husband and wife are living together, the Bills of Sale Act, 1878, has no application to a transaction between them. Nor has it any application, as I think is shown by *French* v. *Gething* (2), where two people are occupying what I may call a common establishment. As DAVEY, L.J., said, in *Ramsay* v. *Margrett* (1), at p. 27:

> . . . she [the claimant] purchased from her husband goods which were then in their common use in the conjugal domicil, and the goods remained there after the purchase.

He then cited the passage from LITTLETON ON TENURES which has been referred to, and which I need not cite.

So far as the conjugal domicil is concerned, *French* v. *Gething* (2) says that sect. 8 may not apply, although the parties are not husband and wife, and, therefore, there is no question of conjugal domicil. It can apply, as ATKIN, L.J., pointed out, at p. 247, to three friends who may be keeping a common establishment together. I think it could apply to a case where a man was living openly with a mistress instead of A a wife. If he holds the mistress out as the person with whom he is living as his wife, I think one is bound to hold that, on the principle of *Ramsay* v. *Margrett* (1), as the principle of *Ramsay* v. *Margrett* (1) does not apply merely because there is a marriage tie. However, those cases cannot, in my opinion, have any bearing where the transaction involved is a B transaction between a man and his domestic servant, even if he misconducts himself with the domestic servant on one or more occasions. In this case, the claimant was in his house for 11 months as a housekeeper, and received wages as such. It is impossible to say that a servant has a common use of the furniture in the house in which she is living with C her master in the sense in which that expression is used by DAVEY, L.J., in *Ramsay* v. *Margrett* (1), or that it comes within the class of case which was contemplated by the passage in LITTLETON ON TENURES, s. 701. It is perfectly true that my servant has the use of the furniture which I provide for his or her bedroom, or for his or her sitting-room, and has D the use of the kitchen utensils, and so forth, but he or she has not a common use with me; he or she is using them as my servant. Therefore, it seems to me that it would be carrying the doctrine of *Ramsay* v. *Margrett* (1) to an extravagant length to say that, if a man sells his household furniture to his housemaid, or to his butler, and things E go on exactly as before, the property ceases to be in the apparent possession of the master merely because the butler or housekeeper or servant remains in the house and goes on rendering him services. It is entirely different from the case where a mother-in-law and son-in-law, or a mother and son, may be living in the same house, or where two F friends may be sharing a common establishment. I think the judge was well justified in this case in finding that the goods were still in the apparent possession of the husband's execution debtor. Therefore, this appeal fails and should be dismissed.

Appeal dismissed with costs.

G Solicitors: *Samuel Coleman* (for the appellant); *Saville, Bailey & Scott* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

CHAPELTON *v.* BARRY URBAN DISTRICT COUNCIL.

[Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), **January 30, 1940.**]

Bailment—Liability of owner—Hire of deck chair—Conditions negativing liability—Conditions on notice exhibited where chairs stacked—Further conditions on ticket.

The respondent council provided deck chairs for persons desiring to use them on the beach. The vacant chairs were stacked up on the beach, and beside them was a notice reading as follows: " Barry Urban District Council. Cold Knap. Hire of chairs. 2*d.* per session of 3 hours." The appellant received two such chairs from the attendant and, upon payment of the fee, two tickets, which he immediately put in his pocket without examination. On the back of the tickets these words were printed: " . . . The Council will not be liable for any accident or damage arising from hire of chair." The canvas of the chair which the appellant used gave way and he was injured:—

Held: in the circumstances, the appellant was entitled to assume that all the conditions of hire were contained in the notice near the stack of chairs, and was not bound by the condition printed on the back of the ticket. He was, therefore, entitled to recover damages in respect of his injuries.

[**EDITORIAL NOTE.** The basis of the decision here is that the ticket is a mere voucher or receipt and given to the hirer merely for the purpose of being shown at a later time to prove payment or the time of the commencement of the hiring. It is said to be entirely distinguishable from a railway ticket which contains upon it the terms upon which the railway company agree to carry the passenger.

As to Liability of Bailor, see HALSBURY, Hailsham Edn., Vol. 1, pp. 757-759, paras. 1241-1243; and for Cases, see DIGEST, Vol. 3, pp. 72-75, Nos. 133-148.]

Cases referred to:

(1) *Parker* v. *South Eastern Ry. Co., Gabell* v. *Same* (1877), 2 C.P.D. 416; 8 Digest 129, *866*; 46 L.J.Q.B. 768; 36 L.T. 540.

(2) *Thompson* v. *London, Midland & Scottish Ry. Co.*, [1930] 1 K.B. 41; Digest Supp.; 98 L.J.K.B. 615; 141 L.T. 382.

(3) *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. & Div. 470; 8 Digest 127, *855*; 32 L.T. 709.

(4) *Harris* v. *Great Western Ry. Co.* (1876), 1 Q.B.D. 515; 8 Digest 129, *865*; 45 L.J.Q.B. 729; 34 L.T. 647.

(5) *Nunan* v. *Southern Ry. Co.*, [1924] 1 K.B. 223; Digest Supp.; 93 L.J.K.B. 140; 130 L.T. 131.

(6) *Hood* v. *Anchor Line* (*Henderson Brothers*), [1918] A.C. 837; 8 Digest 104, *695*; 87 L.J.P.C. 156; 119 L.T. 684.

(7) *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178; 3 Digest 85, *198*; 52 L.J.Q.B. 121; 48 L.T. 426.

Appeal by the plaintiff from a judgment given by His Honour Judge L. C. Thomas at Barry County Court on Aug. 15. 1939. The action was for damages for personal injury caused by the negligence of the defendant council, their servants or agents. The facts, which were not disputed, are fully set out in the judgment of Slesser, L.J. The question was whether or not in law the plaintiff had adequate notice of the condition disclaiming liability for accident.

Carey Evans for the appellant.

E. Ryder Richardson (for *Griffith Williams*, on war service) for the respondents.

Evans : The existence of conditions was not mentioned on the front of the ticket. The contract was constituted by the plaintiff's assent to the conditions, which were on the notice board, and did not include a disclaimer of liability. [Counsel referred to *Henderson* v. *Stevenson* (3) and *Harris* v. *Great Western Ry. Co* (4). He was stopped by the court.]

Richardson : The front of the ticket gives no indication of what the hirer gets for his money. He is obliged to turn to the back. When he does so, he cannot help seeing the disclaimer of liability. [Counsel referred to ANSON'S LAW OF CONTRACT, 19th Edn., p. 19.] Although the question whether or not all reasonable steps have been taken to give notice of the conditions is a question of fact, in answering which the court must look at all the circumstances, it is for the court to decide as a matter of law whether or not there is evidence that notice was given : *Parker* v. *South Eastern Ry. Co.* (1). If the material term is in the document which contains the contract, it does not matter how slightly it is brought to the notice of the other contracting party. He is in any event bound by it : *Nunan* v. *Southern Ry. Co.* (5). This decision was approved by SANKEY, L.J., in *Thompson* v. *London, Midland & Scottish Ry. Co.* (2). Every citizen must expect to enter into contracts in all sorts of circumstances, and it is his fault if he does not acquaint himself with their conditions : *Hood* v. *Anchor Line* (*Henderson Brothers*) (6). It is for the court to decide as a fact whether or not the contract in question is of a kind in which the display of conditions ought reasonably to be expected : *Watkins* v. *Rymill* (7).

Evans was not called upon in reply.

SLESSER, L.J. : This appeal, which must be allowed, arises out of an action brought by one David Chapelton against the Barry Urban District Council, and it raises a question of some importance to the very large number of people who are in the habit of using deck chairs to sit by the seaside at holiday resorts.

On June 3, 1939, Chapelton went on to the beach at a place named Cold Knap, which is within the area of the Barry Urban District Council, and wished to sit down in a deck chair. There is a café known as Bindle's Café on the beach, and by the side of Bindle's Café there was a pile of deck chairs. By the side of the deck chairs there was a notice in the following terms :

> Barry Urban District Council. Cold Knap. Hire of chairs, 2*d.* per session of 3 hours. . . .

Then followed words which said that the public were respectfully requested to obtain tickets for their chairs from the chair attendants, and that those tickets must be retained for inspection. Having taken two chairs from the attendant—one for himself, and one for a Miss Andrews, who was with him—Chapelton received two tickets from the attendant, glanced at them, and slipped them into his pocket. He said in the court below that he had no idea that there were any conditions on those tickets, and that he did not know anything about what was on the back of them. He then said that he took the chairs to the beach and put them up in the ordinary way, setting them up firmly, as he said, and that, when he sat down, he had the experience, which many of us have had from time to time, of going through the canvas. Unfortunately, he had a bad jar, the result of which was that he suffered injury and had to see a doctor, and in respect of that injury he brought his action.

The county court judge had found that, if he had been satisfied that the plaintiff had had a valid legal claim, he would have been entitled to the sum of £50 in addition to the special damages claimed. He also found that the accident to the plaintiff was due to negligence on the part of the defendants in providing a chair which was unfit for use, and which gave way in the manner stated. Nevertheless, he found in favour of the defendants, by reason of the fact that on the ticket which was handed to Chapelton when he took the chair there appeared these words:

> Available for 3 hours. Time expires where indicated by cut-off and should be retained and shown on request. The council will not be liable for any accident or damage arising from hire of chair.

As I read the county court judge's judgment—and we have had the advantage of a note taken by counsel for the appellant—in addition to the summary reasons which the county court judge gives for his decision, he said that the plaintiff had sufficient notice of the special contract printed on the ticket, and was, accordingly, bound by the same. That is to say, as I understand it, the county court judge has treated this case as a case similar to the many cases which have been tried in reference to conditions printed on tickets, and more particularly, on railway tickets, and has come to the conclusion that the local authority made an offer to hire out this chair to Chapelton only on certain conditions, which appeared on the ticket—namely, that the council would not be responsible for any accident which arose from the use of the chair—and they say that Chapelton hired the chair on the basis that that was one of the terms of the contract between him and themselves, the local authority.

Questions of this sort are always questions of difficulty, and are very often largely questions of fact. In the class of case where it is said that there is a term in the contract freeing railway companies, or other providers of facilities, from liabilities which they would otherwise incur at common law, it is a question of how far that condition has been made a term of the contract and how far it has been sufficiently brought to the notice of the person entering into the contract with the railway company, or other body, and there are numerous authorities on that point. In my view, however, the present case does not come within that category of case at all. I think that the contract here, as appears from a consideration of all the circumstances, was this. The local authority offered to hire chairs to persons who wished to use them to sit upon on the beach. There was a pile of chairs standing ready there for use by anyone who wished to use them, and the conditions on which the local authority offered persons the use of those chairs were stated in the notice which was put up by the pile of chairs—namely, that the price of using a chair was 2*d.* per session of 3 hours. I think that that was the whole of the offer which the local authority made in this case. They said, in effect: "We offer to provide you with a chair, and, if you accept this offer and sit in the chair, you will have to pay 2*d.* per session of 3 hours for that privilege."

I think that, when the plaintiff, in common with other persons who used these chairs, took the chair from the pile—it happened to be handed to him by an attendant, but I suppose that he might well have taken it for himself if the attendant had been on his rounds collecting money, or was otherwise away—and simply thought that he was liable to pay 2*d.* for the use of the chair and that the local authority were liable to him for such common law obligations as might arise from their furnishing of the chair to him. No suggestion of any restriction of the council's liability appeared in the notice near the pile of chairs. That, I think, is the proper view to take of the nature of the contract in this case. Then the notice contained these further words:

> The public are respectfully requested to obtain tickets properly issued from the automatic punch in their presence from the chair attendants.

The very language of that "respectful request" shows clearly, to my mind, that, for the convenience of the local authority, the public were asked to obtain from the chair attendants tickets—mere vouchers—which were receipts, and which showed how long a person hiring a chair was entitled to use that chair. It is wrong, I think, to look at the fact that this particular man obtained his receipt at the same time as he took his chair as being in any way a modification of the contract which I have indicated. This was a general offer to the general public, and I think that it is right to say that one must take into account here that there was no reason why anybody taking one of these chairs should necessarily obtain a receipt at the moment when he took his chair. Indeed, the notice is inconsistent with that, because it "respectfully requests" the public to obtain receipts for their money. It may be that somebody might sit in one of these chairs for one hour, or two hours, or, if the holiday resort was a very popular one, for any time, before the attendant came round for his money, or it may be that the attendant would not come to him at all for payment for the chair, although in that case I take it there would be an obligation upon the person who used the chair to search out the attendant, like a debtor searching out his creditor, in order to pay him the sum of 2*d.* for the use of the chair and to obtain a receipt for the 2*d.* paid.

I think that the county court judge has completely misunderstood the nature of this agreement. I do not think that this document was in the nature of a term of a contract at all, and I find it unnecessary really to refer to the different authorities which were cited to us, save that I would just mention a passage in the judgment of MELLISH, L.J., in *Parker* v. *South Eastern Ry. Co.* (1), where he points out that it may be that a receipt or ticket may not contain terms of the contract at all, A but may be a voucher. He says, at p. 422 :

> For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread.

B

I think that the object of the giving and the taking of this ticket was that the person taking it might have evidence at hand by which he could show that his obligation to pay 2*d.* for the use of the chair for three hours had been duly discharged, and I think that, in the absence of any qualification of liability in the notice put up near the pile of chairs, C it is altogether inconsistent to attempt to read into it the qualification contended for. In my opinion, this ticket is no more than a receipt, and it is entirely distinguishable from a railway ticket which contains upon it the terms upon which the railway company agree to carry the passenger. This, therefore, is not, I think, as counsel for the respon- D dents has argued, a question of fact for the county court judge. I think that the county court judge as a matter of law has misconstrued this contract, and, looking at all the circumstances of the case, he has assumed that this condition on the ticket, or the terms upon which the ticket was issued, has disentitled the plaintiff to recover. The class E of case with which SANKEY, L.J., dealt in *Thompson* v. *London, Midland & Scottish Ry. Co.* (2), which seems to have influenced the county court judge in his decision, is a class of case different from that which we have to consider in the present appeal. I think, therefore, that this appeal should be allowed. F

MACKINNON, L.J. : I agree that this appeal should be allowed. The county court judge decided this case relying upon a *dictum* of SANKEY, L.J., in *Thompson* v *London, Midland & Scottish Ry. Co.* (2), when he was speaking of a transaction which was totally different from G the transaction in this case. If a man does an act which constitutes the making of a contract, such as taking a railway ticket, or depositing his bag in a cloakroom, he will be bound by the terms of the document handed to him by the servant of the carriers or bailees, as the case may be. If, however, he merely pays money for something, and receives H a receipt for it, or does something which may clearly only amount to that, he cannot be deemed to have entered into a contract in the terms of the words which his creditor has chosen to print on the back of the receipt, unless, of course, the creditor has taken reasonable steps to bring the terms of the proposed contract to the mind of the man. In this case there is no evidence at all upon which the county court judge could find that the defendants had taken any steps at all to bring the terms of their proposed contract to the mind of the plaintiff. In those circumstances, I am satisfied that the defendants could not rely upon the words on the back of the ticket issued to the plaintiff, and, having admittedly been negligent in regard to the condition of the chair, they had no defence to the plaintiff's cause of action. I agree that this appeal should be allowed.

Goddard, L.J.: I agree. In my view, the cases which deal with railway tickets, cloakroom tickets, or documents issued by bailees when they take charge of goods, have no analogy with this case. In this case, the appellant paid 2*d.* in order to have the right to sit on a chair on the beach. He was asked to take a ticket in the form of a receipt for that purpose, and he was given a document which showed nothing on the face of it except the fact that the man had the right to sit on the chair until 7.30 p.m. on the day when the accident occurred and the fact that the ticket was not transferable. I cannot imagine that anybody paying 2*d.* in those circumstances for the privilege of sitting on a chair on the beach would think for one moment that there were being imposed upon him some conditions which would limit his ordinary rights, or that the document he received when paying his 2*d.* was a contractual document in any shape or form. I think that the ticket he received was nothing but a receipt for his 2*d.*, a receipt which showed him how long he might use the chair. I think that the county court judge was quite wrong in thinking that *Thompson* v. *London, Midland & Scottish Ry. Co.* (2), upon which he seems to have relied, had any bearing on the present case. One must have regard to the facts of the case and the general circumstances of the case. In my opinion *Thompson* v. *London, Midland & Scottish Ry. Co.* (2) has no bearing at all on this case.

I agree that there was no evidence upon which the county court judge could find that the plaintiff was bound by this condition on the ticket, and, therefore, this appeal must succeed.

Appeal allowed with costs. Judgment for the plaintiff for £52 2*s.* 6*d.* *with costs.*

Solicitors: *Kingsley Wood, Williams & Murphy*, agents for *Edward T. Davies & Son*, Cardiff (for the appellant); *Wrentmore & Son*, agents for *Thos. John & Co.*, Cardiff (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

UNSWORTH *v.* ELDER DEMPSTER LINES, LTD.

[Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), **January 22, 23, 1940.**]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Receipt signed "without prejudice"—Onus of proof where unequivocal act proved—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (1).

On Mar. 8, 1938, the appellant was injured in the course of his employment, and such injury was admittedly due to a breach of statutory duty by the defendants. From Mar. 18, 1938, until Aug. 19, 1938, workmen's compensation at the appropriate rate was paid to him without any reservation by him, and from the latter date to the date of trial he had continued to receive the same amounts of compensation, but in the receipts for such compensation had added the words "without prejudice." At no time did he make any other reservation of his rights, either to the clerk paying him the compensation or to anyone else acting on behalf of the defendant company. It was proved that he had not become aware that he had to elect between receiving workmen's compensation and suing in an action for damages at the time he first signed the receipt "without prejudice":—

Held: the payments up to Aug. 19, 1938, were received without the knowledge that they were payments in respect of workmen's compensation, and those received after that date were received with a sufficient reservation of his rights. There was, therefore, no election between the alternative remedies under the Workmen's Compensation Act, 1925, s. 29 (1).

Decision of Croom-Johnson, J. ([1939] 3 All E.R. 339) *reversed.*

[**EDITORIAL NOTE.** The question whether or not there has been a binding election is largely one of fact, and, indeed, is one of those questions of mixed fact and law upon which every case must more or less be an authority only on its own facts. At the same time, there has been a widely held opinion that a receipt for compensation which includes the words "without prejudice" is a sufficient protection for the workman. The present case considers this matter very fully. The essential matter underlying such a case as this is the knowledge of the workman of his choice between two remedies, and, if the receipt of compensation is relied upon as an election, the receipt of such compensation must be at a time when he had such knowledge or with a sufficient reservation. The previous decisions in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and *Selwood* v. *Towneley Coal & Fireclay Co., Ltd.* (2) had made it doubtful whether there was a sufficient reservation of rights in the present case, but those decisions are here distinguished.

As to Alternative Remedies, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071; see also WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 518-524.]

Cases referred to:

(1) *Perkins* v. *Hugh Stevenson & Sons, Ltd.*, [1940] 1 K.B. 56; [1939] 3 All E.R. 697; Digest Supp.; 161 L.T. 149.

(2) *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.*, [1939] 4 All E.R. 34; Digest Supp.

(3) *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639; 34 Digest 495, *4087*; 72 L.J.K.B. 857; 89 L.T. 318; 5 W.C.C. 65.

(4) *Codling* v. *Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055; 34 Digest 491, *4067*; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786; *affg.*, [1914] 2 K.B. 61.

(5) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 21 Digest 218, *540*; 48 L.J.Q.B. 705; 41 L.T. 418.

(6) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; 36 Digest 382, *581*; 51 L.J.Q.B. 612; 47 L.T. 258.

(7) *Bennett* v. *Whitehead (L. & W.), Ltd.*, [1926] 2 K.B. 380; 34 Digest 492, *4068*; 135 L.T. 329; 19 B.W.C.C. 133.

(8) *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. A 181; *affg.* S.C. *sub nom. Waddell* v. *Kinneil Cannel & Coking Coal Co., Ltd.* (1930), 23 B.W.C.C. 567.

(9) *Huckle* v. *London County Council* (1910), 27 T.L.R. 112; 34 Digest 495, *4090*; 4 B.W.C.C. 113; *affg.*, 26 T.L.R. 580.

(10) *Davenport* v. *R.* (1877), 3 App. Cas. 115; 31 Digest 472, *6195*; 47 L.J.P.C. 8; 37 L.T. 727.

B (11) *Croft* v. *Lumley* (1858), 6 H.L. Cas. 672; 31 Digest 376, *5229*; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; *affg.* (1856), 5 E. & B. 682.

(12) *Re Daintrey, Ex p. Holt*, [1893] 2 Q.B. 116; 4 Digest 105, *946*; 62 L.J.Q.B. 511; 69 L.T. 257.

(13) *Avery* v. *London & North Eastern Ry. Co., Harris* v. *London & North Eastern Ry. Co., Bonner* v. *London & North Eastern Ry. Co., Watson* v. *London &* C *North Eastern Ry. Co.*, [1938] A.C. 606; [1938] 2 All E.R. 592; Digest Supp.; 107 L.J.K.B. 546; 159 L.T. 241; 31 B.W.C.C. 133.

APPEAL by the plaintiff Unsworth, from a judgment of CROOM-JOHNSON, J., dated May 3, 1939, at the Liverpool Spring Assizes, and reported *sub nom. Burke and Unsworth* v. *Elder Dempster Lines, Ltd.*, D [1939] 3 All E.R. 339, where the facts and arguments are fully set out.

Wilfrid Clothier, K.C., and *M. Turner-Samuels* for the appellant.

G. J. Lynskey, K.C., Hartley Shawcross, K.C., and *C. N. Shawcross* (for *Robertson Crichton*, on war service) for the respondents.

Clothier, K.C.: There can be no election without knowledge of the E right to elect: *Scarf* v. *Jardine* (6), *per* LORD BLACKBURN, at pp. 360, 361, *Kendall* v. *Hamilton* (5), *per* LORD BLACKBURN, at p. 542, and *Codling* v. *Mowlem (J.) & Co., Ltd.* (4). The second limb of sect. 29 (1) does not confer an independent defence upon the respondents. The protection in the second limb against double payments depends upon F there having been an election by the same person, who, having elected, is precluded from receiving payment both under and independently of the Act: *Bennett* v. *Whitehead (L. & W.), Ltd.* (7). [Counsel referred to *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (8).] The acceptance by the appellant of the payments before Aug. 19, 1938, without G knowledge of their statutory nature, or of his right to damages or to elect, and without any clear indication by the respondents of their nature, ought not to be construed as an unequivocal election to bar him from subsequently claiming damages. The words "without prejudice," coupled with the letters, were words apt to indicate that H the appellant was accepting those payments on the condition that his rights apart from the Act were not to be thereby prejudiced. They were in fact sufficient to achieve that purpose: *Oliver* v. *Nautilus Steam Shipping Co.* (3) and *Huckle* v. *London County Council* (9). The cases of *Davenport* v. *R.* (10) and *Croft* v. *Lumley* (11), cited by the judge, merely decided that a landlord cannot approbate and reprobate a lease.

[Counsel referred to *Re Daintrey, Ex p. Holt* (12), *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (2).] The principle underlying the *Kinneil Cannel* case (8) and *Avery* v. *London & North Eastern Ry. Co.* (13) is that sect. 29 (1) of the Act confers an option upon a workman injured by accident arising out of and in the course of his employment, or upon his representatives or dependants, and that the exercise of that option is not to be frustrated by any payment which the employer may make not in accordance with the election made by each one of those who are entitled to make it. Though knowledge of the right to elect is in general necessary to a true election, a workman may so act as to lead his employer to believe that the workman has in fact elected with knowledge of his right to elect, and so as to induce the employer to pay in accordance with that apparent election. Whether or not the workman has so acted in that unequivocal manner is a question of fact. In *Perkins'* case (1), the workman claimed compensation under the Act, and signed a receipt in which he declared his election and his acceptance of compensation under the Act. In *Selwood's* case (2), the acceptance of compensation on the basis that it was compensation under the Act was held to be the equivalent of election, even if the workman did not know of his option. The facts in the present case were quite different from those upon which these cases were decided.

Lynskey, K.C.: The workman, having received payments from his employers, was debarred from bringing an action against them at common law, irrespective of whether or not he knew of his rights: *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (2). The present case is distinguishable from *Oliver* v. *Nautilus Steam Shipping Co.* (3). There an insured person refused to accept moneys from an insurance agent in respect of compensation unless he added the words "without prejudice," to which course the agent assented. In this case, there has been no such assent by the employers to the addition of these words. The workman has made his election under sect. 29 (1) of the Act by having in fact received compensation, and is, therefore, in accordance with the provisions of that section, disentitled to recover at common law. The workman has been receiving half his wages, and this is the amount to which he is entitled under the Act.

Slesser, L.J.: This case once more raises a very difficult problem, which is constantly before the court, arising out of the Workmen's Compensation Act, 1925, s. 29 (1). The question which has to be considered in this class of case is in what circumstances a man, having received compensation from his employer when he has suffered an injury in working for his employer, can be said so to have received compensation under the Workmen's Compensation Act as to preclude him from proceeding with the remedy which he might otherwise have at common law. Sect. 29 (1) provides as follows:

> When the injury was caused by the personal negligence or wilful act of the

> employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . .

A It has been decided in this court in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), and also in *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (2), that, where a workman has either claimed compensation from his employers under the Workmen's Compensation Act and been paid compensation or accepted payments sent to him by his employers as B compensation without making any claim, in such cases the employer cannot be held liable to any damages in proceedings taken by the workman at common law. It is the basis of the decision both in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), and in *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (2), that the workmen, without any qualification, C either claimed and received payment of workmen's compensation or received it from the employers knowing it to be compensation without making a claim.

On the other hand, it has been held in another decision in this court, in the case of *Oliver* v. *Nautilus Steam Shipping Co.* (3), that, in cases D where a workman receives from his employer after injury weekly payments which are not to be taken as payments made by the employer under the Workmen's Compensation Act or received by the workman as payments of compensation under the Workmen's Compensation Act, then, as the language of the statute, I think, itself makes clear, sect. 29 (1) E does not operate at all. As ROMER, L.J., puts it in *Oliver* v. *Nautilus Steam Shipping Co.* (3), at p. 651:

> . . . proceedings by a workman against his employer for compensation should not be held to irrevocably bind the workman in the exercise of the option given him by sect. 6 [now sect. 29] unless those proceedings have resulted in some compensation, as such, being paid to and received by the workman in such a manner so as to bind F both parties.

The question which arises in the particular case before us is whether this is a class of case where the workman has been paid and has received compensation as such, bringing the case within *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), and excluding him, therefore, from the right to take G common law proceedings, or a case where he has not received compensation as such, in which he has not made his election, and payments will not have been made both independently of and under the Workmen's Compensation Act, and is, therefore, free to proceed with his common law remedy.

H The history of the case is to be divided into two periods. This man was injured by an accident which is now admitted to have been the result of negligence on the part of the employer, and to be actionable, because it is admitted that, apart from preclusion of the right under sect. 29, the action would lie. On Mar. 8, 1938, he was working on a certain ship, the Accra. He was helping to load the vessel, when a beam which was unsecured fell upon him and he was injured. Consequent upon his injury, he thought, according to his evidence, that he would be "entitled"—which was the word he finally used in answer to a question—or, at any rate, would be likely, to receive half his wages if he went to the employers and claimed them. He referred to this payment which he received as "accident money." He said that all his fellow-workmen, when they were injured at work, got it, and he therefore proceeded to go to the proper place and ask for his accident money, which he received. From week to week, on receiving this accident money, which was half his wages, he signed his name on a sheet issued by Elder Dempster Lines, Ltd., which was headed with the word "Compensation" and the appropriate date. On the other hand, he said—and the judge accepted his evidence upon this point—that he had never heard of the Workmen's Compensation Act, and that he did not know the difference between his right to damages and his right to compensation under the statute. The judge has accepted his evidence on that point. The man says that until a very recent date, when he happened to be at the Manchester Assizes—why I do not know—and went into the library and asked the librarian to give him some textbooks (which he says he found very confusing), he did not know anything about the Workmen's Compensation Act at all. It was only after he had been to visit a solicitor in Aug., 1938, that he knew that he had the right to choose between making a claim for compensation and bringing a claim for damages. In other words, when the man received this money, he did not know whether he was receiving it as the result of some right he had under the Workmen's Compensation Act or as the result of some arrangement made between his trade union and his employers by which people in the place should be compensated, or as an act of grace on the part of his employers. All he knew was that, when his friends were injured, they were in the habit of receiving half their wages.

It was pointed out by me to counsel for the respondents in the course of the case that it by no means follows, under the Workmen's Compensation Act, that the workman will be entitled to receive half his wages. That may be the maximum amount fixed in case of incapacity, but it may be that, by reason of the workman's being able to do light work, or for other reasons, economic or physical, his actual statutory right may be considerably less than half his wages. We do not know. At any rate, the judge has found as a fact that this man did not know of any legal rights which he might possess to receive compensation.

In those circumstances, the question arises whether or not this man elected to receive this workmen's compensation. Did he receive it "as such," to use the expression of Romer, L.J.? I have no doubt at all that the employers intended to pay the money as compensation, but I can find no evidence that this man intended to receive the money as compensation under the Workmen's Compensation Act. For all he knew, he might be receiving compensation to which he was entitled at common law as a compromise of his right to damages. Such was the position until the time when he consulted his solicitors and his attention was drawn to the fact that he might claim damages. We do not know exactly what the solicitors told him, but the substance of it, as appears in the evidence, was that the solicitors asked him whether he had taken compensation, and, when the workman said that he had, gave him certain advice.

As a result of that advice, a letter was written to the employers on Aug. 15, 1938, to this effect:

> We have been consulted by Richard John Unsworth, of 20, Southill House, Southill Road, Liverpool, with reference to injuries sustained by him on Mar. 8, 1938, at about 3.30 p.m. on board the Accra in West Brunswick Dock, when the beam in No. 2 hatch gave way owing to the fact that there was no bolt in the beam. According to our instructions, it would appear that our client's injuries are due to the negligence of yourselves, your servants or agents, and we should be glad to hear by return of post that you are prepared to admit liability in the matter, and pay our client such damages and costs as may ultimately prove reasonable. You will appreciate our client has an alternative claim under the Workmen's Compensation Acts, which claim for the moment he reserves.

I think that that must refer to the right given under the statute by which, if a man fails at common law, he has his compensation assessed under the Workmen's Compensation Act. The answer, dated Aug. 17, is as follows:

> Your letter of the 15th instant addressed to our clients, Elder Dempster Lines, Ltd., has been handed by them to us. Our clients cannot admit that any injuries sustained by your client was due to their negligence or that of their servants or agents, and we accordingly repudiate liability on their behalf. In case you are not so informed, we should point out that your client is in receipt of compensation from our clients at the rate of 25*s*. 9*d*. per week, the payments having been made since Mar. 8 last.

At that point, information concerning the situation had been given to both solicitors. The solicitors for the workman Unsworth had already been told by him that he had had this money, and the solicitors for the employers are informing them to that effect on Aug. 17. On Aug. 19, the solicitors for the workman acknowledge the letter of Aug. 17 from the employers, and reply as follows:

> We suggest the circumstances in which our client met with his injuries are such as to preclude, but for any question of workmen's compensation, any possibility of a successful defence to an action for damages at common law. With regard to the last paragraph, our instructions are that the circumstances in which our client accepted certain payments were such as in no way to invalidate his claim at common law.

As I understand it, that is a statement from the workman's solicitors to the employers' solicitors that the only possible defence would be by reason of the receipt of workmen's compensation, and that, in the circumstances, the fact that their client had accepted the payments were such as would not invalidate his claim at common law, no doubt referring to the fact that they had not received the money as compensation to the knowledge of their client, the workman. On that, following the advice which had been given to him by his solicitors, Unsworth, upon receiving the subsequent payment for the week ending Aug. 26, added after his name the words "without prejudice." He said in his evidence that he was bound to go on receiving those payments, because he had no other means of supporting his wife and family. Being pressed as to the meaning of "without prejudice," he gave what I think is a satisfactory definition when he said that he thought it meant "without bias." A

However, one has to consider the circumstances as a whole. When the facts known to both parties are considered, I myself entertain no doubt that the proper inference is that it was agreed between the workman and the employers, when they paid this money for the week ending Aug. 26, that he should take that money from them without prejudicing B
his rights at common law. I think that that is the fair result to be derived from the information contained in the letters and by the use of the words "without prejudice."

With regard to the use of the words "without prejudice," it was held in *Oliver* v. *Nautilus Steam Shipping Co.* (3) that those words, when C
used by a man who declined to take money from an insurance agent in respect of compensation unless he added the words "without prejudice" (to which the agent assented, saying that he would make a note of it in his notebook), were a protection to the man against its being said against him under sect. 6 of the Workmen's Compensation Act, 1897, as it then D
was, that "he had made an election."

Counsel for the respondents endeavoured to distinguish that case from the present case by saying, as regards this second period after Aug. 26, that the words "without prejudice" were not so assented to by the employers, as they were in *Oliver* v. *Nautilus Steam Shipping* E
Co. (3). In my opinion, however, when the facts are considered, I think that the right inference to draw (and it is a question rather of inference of fact than of any direct evidence) is that here the employers, when they paid the money and obtained without question a receipt marked "without prejudice," and continued to pay on that basis, accepted the position F
that the payments which the man continued to receive were to be received without prejudice to his position at common law, and that, therefore, there was here, as there was in *Oliver* v. *Nautilus Steam Shipping Co.* (3), an agreement between the parties which prevented any question of election arising on the part of the workman. If that be the right view, G
it concludes this case, as I think that for the first period the workman received the money, not as compensation, but neutrally, either as damages, as compensation, or as a result of some private arrangement, whatever it might be, not knowing or understanding what he was receiving, and that, as to the second period, after he was informed that it H
was compensation, and possibly even informed that the further receipt of it would, unless he took steps to the contrary, prejudice his position by creating an election, he and his solicitors took steps between them in fact—by the letters which were written and by the use of the phrase "without prejudice"—to prevent that election from taking place.

In the result, I think that the judge was wrong. In particular I disagree with him when he says in his judgment that this man took this money knowing that it was compensation under the Act. If the judge means that as a finding of fact, it is not to be derived from the evidence. The evidence rather is the other way. The actual language A of the judge is as follows, at p. 349:

> I cannot see what right these plaintiffs had in this case to receive this money as anything other than that which it was. It was offered to them, and they knew it was offered to them, as workmen's compensation in respect of this accident . . .

I can find no evidence in support of that view. I think it was paid as B a solatium, as the result of the accident, if you please as compensation, but whether paid as workmen's compensation under the Workmen's Compensation Act or as partial payment of damages which might or might not afterwards be taken into account in a common law action, or paid through some arrangement with the trade union of which this man C was a member, is all left in the dark. It is for an employer who *prima facie* admits a liability for his negligence to take advantage affirmatively of the section and say that he is protected because the workman has precluded himself by the specific acts mentioned in the section. If the employer cannot prove that fact affirmatively by saying that the work- D men's compensation was taken as such, if one has to speculate as to the capacity in which this money was received, then I think that the workman is entitled to say that the employer has failed to discharge the burden which is cast upon him to protect himself from the liability which he would otherwise have at common law, and I think that he must E bring himself strictly within the language of sect. 29 (1) or else he must fail. For these reasons, I think that this appeal succeeds.

MACKINNON, L.J.: I am glad to think that I can agree with the order proposed by SLESSER, L.J. I confess that, after listening to the F many cases which have been cited to us, I find myself in very considerable difficulty as to the enunciation of any clear principles with regard to the operation of sect. 29. In particular, I am embarrassed by the fact that I was a party to the decision in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), and expressed my agreement with the judgment of SIR G WILFRID GREENE, M.R., in that case.

At first sight, when I heard this case opened, it seemed to me very difficult to state any principle here that was not covered by the decision in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1). I am now satisfied that this case is not concluded by that one, and that there is a difference on H the facts, though I appreciate that the difference may appear to be a small one. I also appreciate that it may be difficult for a judge, seeking to apply the principles previously laid down by this court, to say whether or not the facts of a particular case come within the decision in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1). I say that the difference is a small and narrow one, but I think that it is a real one. In *Perkins* v. *Hugh*

Stevenson & Sons, Ltd. (1), the man knew of the existence of the Workmen's Compensation Act, and he knew that he was accepting money under it. His only ignorance was that he did not know that he had an option to make an alternative claim at common law. I think that the whole basis of the decision in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) consisted of the statement which appears in the judgment of Sir Wilfrid Greene, M.R., at p. 61 ([1939] 3 All E.R., at p. 700) : A

> He [the plaintiff] applied for, and was paid as such, weekly sums by way of compensation under the Workmen's Compensation Act.

In this case, on the facts, this man Unsworth knew nothing of his rights at all, either his rights under the Workmen's Compensation Act or his B rights at common law. All he knew was that he was receiving weekly a sum of money—that is, from the first period up to Aug. 19. On Aug. 19, he was advised by his solicitors, and received, no doubt, some glimmer of illumination as to the subtle legal position which existed. Thereafter he went on receiving the weekly amounts from his employers, C but he gave that receipt for them every week expressed to be " without prejudice." Here, again, one gets a very subtle distinction between these various cases. If one is putting forward on the form of receipt that he received the weekly payments " without prejudice," and that the employers had assented to his so receiving them, then this case would be D exactly like *Oliver* v. *Nautilus Steam Shipping Co.* (3). If, on the other hand, the employers had repudiated this proposal so to receive the money, and the workman had continued to take the money, knowing that they so repudiated his attempt to keep his rights open, and, as in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), given clean receipts for the money E as received under the Workmen's Compensation Act, then the position would have been as in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1).

In this case, it was an intermediate position. He put forward his receipts saying that he received the weekly payments " without prejudice " —that is, without prejudice to his rights, of course—and the employers, F who must be taken to have seen those successive weekly assertions by him, say nothing at all. In those circumstances, I think that one can assimilate the position in this case to the side of the line represented by *Oliver* v. *Nautilus Steam Shipping Co.* (3), rather than to the side of the line creating the disability which occurred in *Perkins* v. *Hugh Stevenson* G *& Sons, Ltd.* (1). I realise, as I have said, that this is a very narrow ground on which to distinguish this case from *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), but, unhappily, one has to take narrow points in the administration of this very obscure branch of legislation. I therefore agree (and I am glad that I can agree) with the proposed order. I would H like to add only this. In *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), in addition to expressing my agreement with the judgment of Sir Wilfrid Greene, M.R., I did in some words indicate that I felt a difficulty as to the ground on which, if the man were allowed to go on with his action at common law, the employers could claim repayment, or take credit for

the £81 they had paid to him in weekly payments under the Act. On further consideration, I do not think that I need have felt this difficulty. I have been assisted by some remarks made in the course of this case by Goddard, L.J. I think that he is right in pointing out that, in the supposed common law action, which might have been allowed to pro-
A ceed, the man's damages would have to be assessed. Part of those damages would be his loss of wages. In so far as he had received his weekly payments from his employers, those receipts would *pro tanto* have diminished the amount of his damages under the head of loss of earnings. Therefore, there would be no question of claiming back the £81, or of
B setting it off against the amount which, in the hypothetical common law action, he would recover, because he would recover in the common law action only his loss of wages less what he might have received from his employers. Therefore, so far as concerns that additional, and really unnecessary, reason so put forward by me in that case, I am not at all
C sure that I was correct. I agree with the proposed order.

Goddard, L.J.: I agree. As we are differing from the judge, I propose to add a few words of my own. If one takes first of all the period from the accident to Aug. 19, the questions arise (i) whether or
D not there had been an election by the plaintiff, so as to debar him from bringing his action at common law, and (ii) whether or not the fact that he had received the payments, which the employers intended to pay him as workmen's compensation, debarred him from now exercising the option which otherwise would have been open to him.

E On that part of the case, it is necessary to look carefully at the facts. In reference to the plaintiff Unsworth, Croom-Johnson, J., said, at p. 349:

> I cannot see what right these plaintiffs had in this case to receive this money as anything other than that which it was. It was offered to them, and they knew it was offered to them, as workmen's compensation in respect of this accident. . . .

F I do not think that that is a right inference to draw from the evidence. The evidence (and the judge accepted it) shows that Unsworth says he was entirely ignorant of what his rights were in respect of an accident which he might sustain during the course of his employment. He did not know that conceivably he might be able to bring a common law
G action. I think, therefore, that it is a reasonable inference to draw that he knew nothing about the mysteries of common employment, or how any employer can sometimes be defeated by pleading a breach of statutory duty, which was what was done here. He says he knew nothing about the Workmen's Compensation Act, and his belief was that he had a
H right to bring an action for damages only if he was injured in the street. In fact, he had never heard of the Workmen's Compensation Act until he read something about a case tried before the same judge at the Manchester Assizes. He then took himself to the Manchester public library, where the perusal of four textbooks which were handed to him, especially Willis on Workmen's Compensation, with its 1,158 pages,

left him exactly as wise, I think, as he was before he went there. However, if a man does not know of his right to elect, it is quite clear, on the authorities, that there is no election. ATKIN, J., as he then was, said in *Codling* v. *Mowlem (J.) & Co., Ltd.* (4)—and his view has been since approved in the House of Lords on this point, though they differed from him on another point—that the doctrine of election in connection with A
sect. 29 of the Workmen's Compensation Act is exactly the same as it is with regard to any other matter in which election can be exercised. There cannot be election, said LORD BLACKBURN, in *Kendall* v. *Hamilton* (5), without knowledge of the right to elect. This man did not know that he had the right to elect, and, knowing nothing about it, B
obviously he could not exercise any election before Aug. 19.

It was said by counsel for the respondents that, as the workman had received payment from his employers, that debarred him from bringing the action, whether or not he knew of his rights. For that, I think his principal authorities were *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), C
to which both SLESSER and MACKINNON, L.JJ., have referred, and *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (2). Both those cases seem to me to be clearly distinguishable from this case. The whole basis of *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) was that the matter had been started by a claim put forward by the plaintiff for workmen's D
compensation. In *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.* (2), although the man had not made a claim, he knew (and there was no question about it) about his rights under the Workmen's Compensation Act. He wanted workmen's compensation, he asked for it, and he got it. Those cases seem to me to have no bearing upon the facts of this E
case, which show, when properly understood, that the workman knew nothing whatever about it. I cannot agree that this man's state of knowledge, which was accepted by the judge, would indicate to him that he was receiving a sum of money under some statutory right. All he knew was that, if he met with an accident and went down to the offices F
of the pool who employed him—he was one of a pool of men who worked for a certain pool of employers—after the accident he would get some money, which he called " accident money." He says that he thought that he would get half his wages. However, he was not necessarily entitled to half his wages, because he might not be wholly incapacitated. G
He thought, nevertheless, that he would get " accident money." If he ever applied his mind to it, which I do not suppose for a moment he did, " accident money " might mean money payable under a contract which could be inferred by custom of the trade, or the custom of the port, or because there had been a collective bargain between the trade union H
and the employers, so that it would be assumed that every dock labourer was employed upon the terms of the bargain which had been agreed between the union and the employers.

I think that it is quite impossible in this case to say, on the evidence which was given here—there was no evidence called by the defendants

—that this man, in receiving this money before Aug. 19, was receiving it with his knowledge as compensation payable under the Workmen's Compensation Act. Therefore, I think that this case is clearly distinguishable from *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and from *Selwood's* case (2). My attention has been called by SLESSER, L.J., to
A the fact that in *Selwood's* case (2) he said, at p. 38:

> . . . if the workman does not receive the money as compensation under the Workmen's Compensation Act, different considerations arise.

That is just the state of affairs which we have here. I think that it is clear on these facts that quite different considerations do arise here.

B With regard to the payments made after Aug. 19, the position was this. The man having been to his solicitors, and having been told, I suppose—as no doubt he was told by his solicitors—in future to take any payments "without prejudice," the solicitors wrote to the employers and asserted that their client was going to bring an action at common
C law. When the employers set up in answer that the workman had since accepted compensation, the solicitors told the employers again:

> On our instructions this was not accepted in such circumstances as would debar him from bringing his action.

The workman then presented himself at the offices of the pool again.
D Whether or not the employers had actually informed the clerk who had to pay the money of this correspondence matters not. The employers' representative was there, and the employers, having knowledge of what the solicitors had asserted this man's intention to be, handed him some money, and, either immediately before or immediately
E afterwards—I should think, from the way these things are done, that it was immediately before, but it does not matter—the workman signed his name on a sheet which was kept for the purpose, and which all men in receipt of compensation sign, and, as he had been told to do, added the words "without prejudice." Thereupon the employers could have
F said: "If you are saying that there is no agreement here to pay you compensation, we are going to stop the compensation, and we are not going to pay any more money." Sect. 12 of the Workmen's Compensation Act, in my opinion, would not afford any difficulties at all to the employers. Sect. 12, which forbids them to stop payment, except as
G a result of arbitration, applies only where there has been an agreement. In these circumstances, the workman could not say that there was an agreement, because he was saying that he had never taken the money under the Workmen's Compensation Act at all. However, the employers continued to pay him week after week money which he received, telling
H the employers that he so received it, without prejudice to the rights which had already been asserted for him by his solicitor. It seems to me that this payment of money comes within *Oliver* v. *Nautilus Steam Shipping Co.* (3), a case which has never been questioned or overruled. If the passage in the judgment of ROMER, L.J., which has already been referred to by SLESSER, L.J., properly states the law, I think that it is

quite clear that the man saved his rights, and, therefore, was not barred from taking his common law action.

I have only one more word to say. I did in the course of the argument, and I still do, venture respectfully to express my disagreement with that part of the judgment of Sir Wilfrid Greene, M.R., in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) which deals with the question of set-off, or recovery of sums paid. It was *obiter*, because it was not necessary for the decision of the case. It was an expression by Sir Wilfrid Greene, M.R., of some difficulty which he thought might arise if the decision had gone the other way. I think that, as it was only *obiter*, one is entitled to express one's dissent from it. I dissent from it on the ground just stated by MacKinnon, L.J. It seems to me that sect. 29 is really designed to prevent the employer from being harassed by two legal proceedings, and is intended to protect him against the danger of having to pay twice over, so that the workman cannot say, when he recovers damages for an accident caused by the personal negligence of his employer : " In addition, I now want my workmen's compensation." Thus, equally, if he has received workmen's compensation, perhaps having been paid up to the full, since he has demanded workmen's compensation, he cannot then turn round and say : " I have demanded my compensation. I have been paid it, and now I am going to launch proceedings against you at common law." Where the payment has been made in such circumstances as when it is held, as we are now holding, that an action at common law would lie, it is clear, I think, that, when the damages are assessed, the employer will not pay twice over, because, when the damages come to be assessed, the only damages which the man recovers, in addition to damages for pain and suffering, are damages for that which he has actually lost, and he will have lost, not the whole of his wages, but only half of his wages. At common law, he would be entitled to recover the whole of the wages which he has lost, but, if he has been paid, no matter what the circumstances, and under whatever name, half the wages which he would otherwise have earned, then, of course, when one assesses the damages in the common law action, one would give him only half his special damages, which is what has been given to him in this case. Therefore, I think that that presents no difficulty. It is not a question either of set-off or of recovery of what has been paid. It is simply a matter of giving him only the damages for that which he has suffered. I agree, therefore, that this appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Silverman & Livermore* (for the appellant) ; *Lawrence Jones & Co.*, agents for *Forwood, Williams & Co.*, Liverpool (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re LUCK, WALKER *v.* LUCK.

[CHANCERY DIVISION (Farwell, J.), **January 12, 16, 26, 1940.**]

Conflict of Laws—Illegitimate child—Legitimation according to law of foreign domicil—Law of domicil recognising subsequent legitimation by adoption—Father not domiciled in foreign country at time of child's birth—Father domiciled in foreign country at time of child's legitimation—Public policy.

Perpetuities—Rule against perpetuities—Distribution—Life in being—Vital date—Not ***date*** *when distribution first possible,* ***but*** *date when distribution actually effected.*

Under a marriage settlement dated Apr. 24, 1867, to which the testator was a party, and by a will dated Dec. 20, 1887, respectively, two funds of property were left, *inter alia*, and as far as is material, on trust for the issue of the testator living at the time of his death or born within 21 years thereafter. His wife having predeceased him in 1892, the testator died in 1896. Both the marriage settlement and the will had been executed in England. Among other children, the testator left a son him surviving. The son married in 1893, and there were two children of that marriage, the second and the third defendants. Some years after his marriage, the testator's son left his wife and proceeded from England to the United States of America. In the state of California, he formed a connection with a woman while his marriage was still subsisting, and of that illicit union the first defendant was born in 1906. It was found as a fact that the first defendant's father was not at that time domiciled in the state of California. In 1922, the wife obtained a divorce from him, and thereafter, in 1925, he married a woman not the mother of the first defendant. At that time, he was domiciled in the state of California, and shortly after the marriage he adopted the first defendant. It was proved that the law of California requires for the legitimation of a child that the latter shall be adopted and received into the home of the parent. This was not, therefore, a case of legitimation by subsequent marriage. The first defendant's father having died in 1938, the first defendant now claimed to be entitled to his share in the funds of the marriage settlement and the testator's residuary estate respectively. On behalf of the second and third defendants, the legitimate children of the first defendant's father, it was contended that, as both the marriage settlement and the will had been executed in England, they had to be construed according to English law, and that, on the authority of *Udny* v. *Udny* (3), the first defendant was barred from taking any benefit, owing to the fact that his father, although domiciled in California at the time of the first defendant's adoption, had not been so domiciled at the time of his birth. It was also contended that to recognise the first defendant as a legitimate child would be contrary to public policy. As regards the fund under the marriage settlement, it was further argued that, the testator having died in 1896, only such children could take as were lawful children in 1917—namely, 21 years after the testator's death—and that, as the first defendant had not been adopted until 1925, it would be an infringement of the rule against perpetuities if he were allowed to benefit :—

HELD : (i) as, according to the law of the country of the father's domicil at the time of the first defendant's adoption, the latter was legitimated as from the date of his birth, he was entitled to his share in the funds, regardless of the fact that his father was not domiciled in that country at the time of the first defendant's birth.

(ii) as this was not a case of legitimation by subsequent marriage, *Udny* v. *Udny* (3) did not apply.

(iii) as distribution had not taken place prior to 1925—namely, the date of the first defendant's adoption—it could not be said that to benefit him would be an infringement of the rule against perpetuities. The vital date was the date of actual distribution, and not the date when distribution had first become possible.

[**EDITORIAL NOTE.** The law of California is peculiar in its provisions relating to the legitimation of children. Generally speaking, legitimation is effected by the subsequent marriage of the parents, although in many cases certain other conditions must also be fulfilled. The present case has nothing whatever to do with legitimation by subsequent marriage, and the decision is founded upon this distinction. The judge has not, therefore, felt himself bound by the decision in *Udny* v. *Udny* (3).

As to Legitimation, see HALSBURY, Hailsham Edn., Vol. 6, pp. 315, 316, para. 367; and for Cases, see DIGEST, Vol. 3, pp. 372-375, Nos. 131-153.]

Cases referred to:

(1) *Re Askew, Marjoribanks* v. *Askew,* [1930] 2 Ch. 259; Digest Supp.; 99 L.J.Ch. 466; 143 L.T. 616.

(2) *Re Wright's Trust* (1856), 2 K. & J. 595; 3 Digest 372, *134*; 25 L.J.Ch. 621; 27 L.T.O.S. 213.

(3) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441; 3 Digest 372, *132*.

Originating Summons to determine whether or not one David George Croft Luck was entitled to a share in certain trust funds under a marriage settlement and a will respectively. The facts and arguments are fully set out in the judgment.

J. A. Reid for the plaintiff.

J. Neville Gray, K.C., and *A. J. Belsham* for the first defendant.

A. F. Maurice Berkeley for the second and third defendants.

Farwell, J.: This summons raises two questions as to whether or not the first defendant, David George Croft Luck, is entitled as a child of Frederick Charles Luck to a one-third or to some other, and, if so, what, share in the settled share of Frederick Charles Luck in certain trust funds settled by Frederick Charles Luck's parents on the occasion of their marriage, and also whether or not the same defendant is entitled to participate in the residuary estate of Frederick George Luck. The question turns upon whether or not the defendant, David George Croft Luck, is, or is entitled to be deemed to be, a legitimate son of his father.

The facts which give rise to this question are as follows. By a settlement made on Apr. 24, 1867, between Frederick George Luck of the first part and Fanny Elizabeth Walker of the second part, and two other persons, as trustees, certain investments and personal property were settled on the usual trusts in a marriage settlement, and the trust after the death of the survivor of the husband and wife was:

> . . . in trust for all or such one or more exclusively of the other or others of the issue of the said intended marriage to be born during the lives of the testator and Mrs. Luck or the life of the survivor of them or within 21 years after the death of such survivor at such age or time or respective ages or times if more than one in such shares and with such future and executory or other trusts for the benefit of the said issue or some or one of them and with such provisions for their respective maintenance education or advancement at the discretion of the trustees or trustee for the time being or of any other persons or person and upon such conditions with such restrictions and in such manner as the testator and Mrs. Luck should by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment jointly appoint . . .

Then there was a gift in the form of an appointment to the issue. The appointment was made on Nov. 12, 1888, by the testator and his wife, and they appointed that the whole of the moneys, stocks, funds, securities and property then subject to the trusts of the settlement (except the moneys assured by or under two several policies of assurance on the life of the testator as therein mentioned) should be held in trust for all the children of their marriage then living and the children then living of any child who should have died leaving children living at the decease of such survivor of them, such children taking amongst them, if more than one, only the share which their parent would have taken if he or she had survived them, but subject nevertheless as to the shares of the children of their marriage of and in all the trust premises to the following trusts. Those trusts were that the share of each child of theirs was to be retained by the trustees of the settlement upon trust to pay the income thereof unto such child during his or her life, as the same should accrue, and, in the case of a female or females, not by way of anticipation, and from and after his or her decease to transfer the same unto the child or divide the same equally between all the children of such deceased child of the testator and Mrs. Luck who should have been born within 21 years after the decease of the survivor of them, and, if any of their children should die without leaving issue to take his or her share under those trusts, then the share of the one so dying should be added to the remaining share or shares as an accretion thereto, and such accretions should be subject to the like trusts as the original shares to which they were added. Mrs. Luck, the wife, died on June 14, 1892, and on Dec. 26, 1892, the testator, the settlor, revoked the appointment so far as it extended to certain real estate. Nothing turns on that, and I need not mention it further. The testator by his will, dated Dec. 20, 1887, appointed certain trustees and executors and gave certain legacies. Then he gave the whole of his residuary estate to trustees in trust for sale, conversion and investment, and then there was a provision for paying the annual income to his wife during her life, and, after her death, as to the capital and income thereof, upon trust for all his children living at his decease who being a son or sons should attain the age of 21 years or being a daughter or daughters should attain that age or be married. Then he declared that the share of each child of his should be held by his trustees upon trust to pay the income thereof unto such child during his or her life and as to each daughter for her separate use without power of anticipation or alienation, and, immediately after the decease of each such child of his, his said trustees should hold as well the capital as the income of the share of his same child in trust for the child, if only one, or all the children, if more than one, of his same child who (either before or after the decease of his same child) being a son or sons should attain the age of 21 years or being a daughter or daughters should attain that age or be married, such children of his same child if more than one to take in equal shares. Then there was a provision that, if any of the testator's children should die without having issue who should attain a vested interest in his or her parent's share of the testator's residuary trust estate, then the share of each child of his so dying with all accretion thereto under that clause should, upon the decease of such last-mentioned child, or the failure of such issue, whichever should last happen, be added to the other share or shares equally of his residuary estate. The testator died on July 1, 1896. There was issue of the marriage of the testator and his wife 9 children, and no more. One of them, the eldest child, died in infancy. The second child was a daughter, who married and who is dead, leaving an infant son, who also is dead. The third child was Frederick Charles Luck, who is the father of the first defendant about whom the question arises. He died on July 6, 1938. The other children are alive, and, in the case of 4 of them, there were no children. The position with regard to Frederick Charles Luck, the third child of the marriage, is this. He was married twice. His first marriage was to Clare Henriette Batiste on Jan. 26, 1893. There were two children of that marriage, the two defendants Charles Pyne Luck and the third defendant, who is a married woman. Some years after the marriage, Frederick Charles Luck left his wife and went abroad. On July 19, 1922, his wife obtained a divorce from him. On July 27, 1925, he married again, and, when he died, he left his wife provided for, but there was no issue of that marriage. Before his second marriage, and while his first marriage was still subsisting, he formed a connection with a woman known as Martha Croft. He lived with her for several years. There was issue of that union the defendant David George Croft Luck, and that child was, of course, according to the law of England, illegitimate, because his father was not married to his mother, and, moreover, there was at the time of the child's birth a subsisting marriage with the first wife which had not then been dissolved. The defendant, David George Croft Luck, was born on July 26, 1906, and he was born in California. Apparently Frederick Charles Luck, the father of this defendant, after he left his first wife was desirous of avoiding her as far as possible. The evidence seems to indicate that his idea was to put a considerable distance between himself and his first wife, and for a time he went to the Continent. In Apr., 1907, before the dissolution of the marriage, he entered into an agreement with his first wife under which certain financial provisions were made for her. In that agreement of Apr. 19, 1907, he described himself as formerly of an English address and then of an American address, and it is recited in that deed that he is engaged in business in the United States and will necessarily be out of England for some years. In the early part of 1906, he went to California. Before that, he had been in New York, and he had been in Europe. In 1906, he and Martha Croft were living together, and went to California, and on July 26, 1906, this defendant was born in California. In Sept., 1907, he acquired a house in California, and he lived in California more or less during the remainder of his life, but there were times when he went elsewhere. He went to Arizona for a time. He made two visits to Arizona, and he was else-

where for a time, but there is no doubt, in my view, and I do not think
that this is seriously disputed, that at some time prior to Oct. 23, 1925,
Frederick Luck was domiciled in California. I do not think that it is
very important to know or to state the exact date upon which he became
domiciled in California. At any rate, to my mind it is reasonably plain
A that at the date of the birth of this defendant—namely, July 26, 1906—
he had not become domiciled in California. The evidence seems to me
to be fairly conclusive as to that. On July 26, 1906, when this defendant
was born, the father had been in California quite a short time only. It
was after that date that he executed the deed, in which he certainly did
B not describe himself as of California. In fact, the recital rather shows
the opposite. In my judgment, it is impossible to say that by that time
he had deliberately abandoned his domicil of origin, which was English,
and acquired a Californian domicil, but at a later date—and the date is
of some importance—in Oct., 1925, he had definitely acquired a Cali-
C fornian domicil. Counsel for the second and third defendants did not
really dispute that by that date he had acquired such a domicil. I
do not propose to go through the evidence in detail. The evidence is
quite plain that he obtained a house and seemed to have settled down
in California, and so to have made California his permanent home, and
D to have abandoned his domicil of origin. After his second marriage, on
Oct. 23, 1925, Frederick Luck proceeded to adopt the defendant, David
Croft Luck, in accordance with the law of California. That is to say,
he signed a document and deliberately took this defendant into his home
with the consent of his wife, who was not, of course, the mother of this
E defendant, and this defendant lived as his son in his house after that date
at any rate for some time. The form of the document which he and his
wife both signed made it perfectly plain, according to the law of
California, that he was deliberately adopting his son as his son, and was
introducing him into his house as his son with the consent of his wife.
F The question of the effect of his so doing is, of course, a question of
Californian law, and that is a pure question of fact. Having read the
whole of the evidence as to the Californian law, I think there is no doubt
at all as to the effect, according to the law of California, of such an act
as was done by Frederick Luck. The effect was that this defendant
G became, according to the law of California, the legitimate son of his
father. Not only that, the effect of the law was that he became the
legitimate son of his father from the date of his birth. The evidence
of the Californian lawyers makes it quite clear that, according to the
law in California, he would be treated in all respects as the legitimate
H son of his father, and, as a question of fact, I find, without any doubt,
that what is the law of California was the law at the time, and, according
to the Californian law, he is, and must be treated as, the legitimate son
of his father.

That being the position, the funds which were the subject both of the
marriage settlement and of the trusts of the will have now become

distributable, and the question which I have to determine is whether or not this defendant is entitled to participate either in the funds of the marriage settlement or in the residuary estate of his grandfather. So far as the construction of both those documents is concerned, the law of this country must, of course, govern the construction, and, that being so, the only persons who can take, either under the trusts of the A
will or the trusts of the settlement, are the children or issue of the settlor and testator, and they must be, according to the law of this country, the legitimate children. The question, therefore, turns upon whether, for the purpose of construing these two documents, the first defendant is to be treated as the legitimate son of his father or whether he is B
illegitimate, and, therefore, barred from taking any share in either of the funds. Whether or not a person is legitimate is, of course, a question of status. I think that it is quite clear on the authorities that *prima facie*, at any rate, the question of a person's status is governed by the law of that person's domicil. If authority is wanted for that, C
I think that it is to be found in the decision of MAUGHAM, J., as he then was, in *Re Askew, Marjoribanks* v. *Askew* (1). If the law of the domicil is to determine whether or not the first defendant is the legitimate son of his father, the answer must be, on the evidence before me, that he is to be so treated. However, it has been said by counsel for the second D
and third defendants, who has argued this case with great ability, that there is an exception to that rule—that is to say, that the law of the domicil governs the question of status to the extent, at any rate, that, in order that the law of the domicil should apply, the person in question must not only have been domiciled in the place where the law is applicable E
at the time when the act was done by the father to make the child legitimate, but he must also have been so domiciled at the time of the birth of the child.

Reference has been made to, and counsel for the second and third defendants quite rightly based his argument upon, a decision of SIR W. F
PAGE WOOD, V.-C., in *Re Wright's Trust* (2) and the later Scottish case of *Udny* v. *Udny* (3), in which LORD HATHERLEY, L.C., as SIR W. PAGE WOOD, V.-C., had then become, gave one of the opinions. It is said that those decisions show that, according to the law of England, in a case where the child is made legitimate by the subsequent marriage of G
his parents, although it has the effect of making the child legitimate according to the law of the domicil of the father, it is not sufficient to entitle that child to be treated as legitimate in this country unless his father was, at the time of his birth, domiciled in the same place. I think it is said in one of the cases that, at the moment of its birth, the H
child must have the potentiality of being made legitimate, and that, if, by the law of the domicil of the father at the time of the child's birth, there was not that possibility, then the subsequent marriage of the father and the mother of the child is insufficient to render the child legitimate according to the law of this country. There is no doubt that that is

the effect of the decisions, both in *Re Wright's Trust* (2) and, I think, in *Udny* v. *Udny* (3), and those decisions, if they apply here, are undoubtedly binding upon me, and I am bound to follow them. I confess, however, that I feel great difficulty in appreciating exactly on what ground those decisions have been based. If the law which governs A status is the law of the domicil, I myself find it very difficult to appreciate why there has to be introduced into the law of the domicil some portion of the law of England, and why it is not sufficient to satisfy the requirements of the law of the domicil to make the child legitimate without having introduced into that law an element of the English law. Not-B withstanding my difficulty in appreciating the reason, I am still bound by those authorities, if they apply. In my judgment, however, they are not applicable in a case of this kind, where the facts are so widely different from the facts in those cases. In those cases, that which made the child legitimate according to the law of the domicil was the subsequent C marriage of the parents, but in the present case the position is totally different. It is not a question of marriage at all. According to the law of California, if the father, being domiciled in California at the time, performs the act which may be called the act of adoption—namely, takes the child into his own home as his legitimate child with the consent D of his wife—and does that formally, so that the act is as far as possible done publicly, then, according to the law of California, that does make the child legitimate, and it makes the child legitimate, not from the date when the act was done, but from the time of his birth. In my judgment, those facts, which are quite unlike the facts in the two cases E I have mentioned, where the act which legitimated the child was the subsequent marriage of his parents, appear to me to be so different that they are not decisions which are binding upon me in this particular case. The law of California is peculiar, so far as I am aware, in that it does so make a child legitimate. The idea of the legitimation of a child by F the subsequent marriage of his parents is, of course, not uncommon, but all the cases in which the rule as to the necessity for the father being domiciled in the country at the time of the birth of the child have been considered are cases where the legitimation has been by marriage, and I know of no authority, and I can find no authority, which can assist G me in dealing with a case where the law is what it is in California.

In those circumstances, it appears to me that it is open to me to decide this case in the way which appears to me to be the right way, without being bound to follow the earlier decisions, which are decisions upon a H different state of facts. In my judgment, if it be true to say that the question of the status is a question which, according to the law of this country, must be governed by the law of the domicil, then there can be no doubt that, according to the law of the domicil—namely, the law of California—this defendant is the legitimate son of his father, and he is legitimate from the date of his birth. In those circumstances, I myself

am wholly unable to see why he is not entitled to participate, at any rate, in the property subject to the trusts of the will of the testator. The question must be in this case, as in all other similar cases, who are the children or issue of the testator, meaning thereby the legitimate children or issue of the testator, and the answer—and the only answer which can be given to that question if the law of the domicil of this A
defendant is to be taken into consideration, as, in my judgment, it must be—is that this defendant is one of the children or issue of the testator, and, as such, is entitled to participate in his residuary estate.

I should say before I leave this matter that counsel for the second and third defendants has also argued that, apart from the question of the B
domicil at the date of the birth, the law will not recognise such a legitimacy as in this case, because it would be against public policy. That seems to me to be an argument to which I cannot give effect. As I have said, the law of the domicil makes this defendant legitimate, and, in my judgment, it would not be right for me to say that, notwithstanding C
that law, the child must not be treated as legitimate merely because, according to the views of some people, and possibly according to the views of people in this country, such a legitimation may not be desirable, or may be rendered impossible, according to the law of this country, by the fact that the child was born of a person who was not the father's D
wife, and who could not be the father's wife at that time, because the father was married to somebody else, and, more than that, when the first wife ceased to be his wife, he married another woman, not the mother of the child. That may appear to some minds to be a most undesirable state of affairs in which to permit the child of the irregular union to be E
legitimated, but that is the law of the domicil, and, in my judgment, it would be wrong for me to say that that law was not to be applied because, as I say, the circumstances in which the legitimation took place may be such as would not be looked at with approval in this country. F

Therefore, so far as the property which is subject to the trusts of the will is concerned, in my judgment, the first defendant is entitled to participate. However, that does not solve the question whether or not that defendant is entitled to participate in the marriage settlement fund, because different considerations arise with regard to that. The children or issue who G
could participate in the marriage settlement fund were such lawful children or issue as were living on July 1, 1917—namely, the expiration of 21 years after the death of the testator. It is said, and said truly, that, if on that date or at any time before 1925 the funds had become distributable and the trustees had been called upon to distribute them H
between the persons entitled, they must have ignored this first defendant, because, although he was a life in being, at that date in 1917 it would have been impossible for him to prove that he was the legitimate son of his father, and that, in those circumstances, the court must exclude him, at any rate, from the marriage settlement fund, because he was

not at that date a person who would have been entitled to share at all, and that the trustees, had they been called upon to distribute the fund, would have been bound to distribute it omitting this defendant, and, had they refused to do so, the court would have ordered them to make such a distribution. It is said, and no doubt truly said, that, had they made that distribution, then this defendant could not subsequently have attacked them for having wrongly parted with the funds. However, there was not a distribution in 1917, and there has not been a distribution down to this date, and, in my judgment, what the court has to do when it is asked to determine who are the persons entitled to participate in the fund is to answer the question, having regard to all the facts as they are at the date when the court is asked to make an order. In my judgment, the court is not entitled to ignore or overlook any of the material facts, and one of the material facts in this case is the fact that now this defendant is, and must be treated as, the legitimate son of his father. The fact that he was a life in being at the critical date is not, of course, in dispute, and now he is in a position to say: "I fulfil the necessity of showing that I am the legitimate son of my father, and that I was alive on July 1, 1917, and, therefore, I am a person who is entitled to a share in these funds." In my judgment, that is the state of facts which the court has to consider when it is asked to make an order for distribution or to decide the question as to who is entitled to participate. The court is not, in my view, entitled to ignore the position that this defendant is now the legitimate son of his father. It is said that that in some way offends against the rule against perpetuities, but, in my judgment, that is not so. This defendant was a life in being at the critical date. It is true that at that date he could not have proved that he was the legitimate son of his father, but he is now in a position to fulfil that condition, and, in my judgment, the court, taking the state of affairs as it is to-day for the purpose of making an order as to who are the persons entitled to participate, must come to the conclusion that this particular defendant is entitled, along with the other legitimate children or issue of the testator, to a share in the settled fund.

For those reasons, I have come to the conclusion that this defendant is entitled to share, together with the other persons, in both the settled funds and the will fund. The question is one of considerable difficulty, but, having carefully considered the cases—and because I have not cited them it must not be thought that I have not carefully examined and considered them—I have come to the conclusion to which I have come. It does not appear to me that it would assist if I were to go through the various cases in any detail—there are several of them at which I have looked, and which I have examined—because I have stated what, in my view, is the effect of the whole matter. Therefore, it is sufficient, in my judgment, for me to decide as I have done, and make the declarations accordingly. I will make a declaration that the defendant, David George Croft Luck, is entitled, as a child of Frederick

Charles Luck, deceased, to one-third of the settled share, and similar declarations with regard to the residuary estate of the testator.

First defendant entitled to one-third share in each of the funds. Costs as between solicitor and client payable as to one-half out of each fund.

Solicitors: *Stibbard, Gibson & Co.* (for the plaintiff); *Crane & Hawkins* (for the first defendant); *Kenneth Brown, Baker, Baker* (for the second and third defendants).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

BRACKENBOROUGH *v.* SPALDING URBAN DISTRICT COUNCIL.

[Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), **January 24, 25, 1940.**]

Animals—Escape on to highway—Escape from pen provided by local authority at cattle market for cattle waiting to be certified for subsidy—Liability of local authority—Livestock Industry Act, 1937 (c. 50)*—Cattle Subsidy Scheme (Approval) Order,* 1937 (*S.R. & O.,* 1937, *No.* 659), *Schedule, para.* 1.

Public Authorities—Liability for negligence and nuisance—Cattle market provided for cattle waiting to be certified for subsidy—Pen insecure—Animal escaping and doing damage—Livestock Industry Act, 1937 (c. 50)*—Cattle Subsidy Scheme (Approval) Order,* 1937 (*S.R. & O.,* 1937, *No.* 659), *Schedule, para.* 1.

The S. Market, which was owned by the appellant council, was an approved certification centre for the purposes of the Cattle Subsidy Scheme, 1937. That scheme required, *inter alia,* that the place where animals were to be examined should be equipped with adequate penning accommodation for cattle. P., a local farmer, sent a number of steers in charge of employees to the market to be graded. The man in charge of the centre put them in a pen which was ordinarily used for the purpose of a normal market day. The pen consisted of permanent obstructions on three sides, while in front was a chain. Waiting at the market to meet the animals was B., who was the appellant's husband and P.'s foreman. One of the steers, while waiting to be graded, escaped under the chain, ran amok, and knocked down and killed B., whose widow sued the appellant council as the highway authority and the owners of the market, founding her action both in negligence and in nuisance:—

Held: as P., through his employees, had at all times, retained control of the animal, and as the appellant council, though they had allowed it to be brought into the pen for the purpose of certification, had not at any time assumed any control over it, they were under no liability for injuries caused by its escape.

[**EDITORIAL NOTE.** The basis of this decision is that the animal was at all times in the custody and control of the farmer's servant, and not in that of the local authority. Upon this finding, it became immaterial to consider whether or not the pen was properly fenced for preventing the escape of the animal, and, indeed, whether or not the pen was provided by the local authority under a statutory or other duty. It would appear, however, that the court took the view that the authority was under no duty to provide the pen, and, therefore, would not be liable if the pen were such that it permitted the escape of an animal placed within it.

As to Injuries by Domestic Animals, see HALSBURY, Hailsham Edn., Vol. 1, pp. 539-542, paras. 929-932; and for Cases, see DIGEST, Vol. 2, pp. 229-235, Nos. 198-230.]

Cases referred to:

(1) *Deen* v. *Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.

A (2) *Knott* v. *London County Council*, [1934] 1 K.B. 126; Digest Supp.; 103 L.J.K.B. 100; 150 L.T. 91.

(3) *M'Kone* v. *Wood* (1831), 5 C. & P. 1; 2 Digest 239, *250*.

(4) *North* v. *Wood*, [1914] 1 K.B. 629; 2 Digest 240, *255*; 83 L.J.K.B. 587; 110 L.T. 703.

B (5) *Lax* v. *Darlington Corpn.* (1879), 5 Ex.D. 28; 33 Digest 528, *52*; 49 L.J.Q.B. 105; 41 L.T. 489.

Appeal by the defendants from a verdict and judgment of Cassels, J., and a special jury, given at Lincoln Assizes on June 13, 1939. The facts are fully set out in the judgment of Slesser, L.J.

C *H. J. Wallington, K.C.*, and *G. A. J. Smallwood* for the appellants.

P. E. Sandlands, K.C., and *M. D. Van Oss* for the respondent.

Wallington: The steers were taken by the farmer's men to the place where the market was held and where they were to be weighed and graded. They were placed in the pen and looked after there by the D farmer's men, and never left the control of the farmer's men. The appellants never took over control of the steers, and, therefore, never assumed any obligation in respect of them, or any duty to protect the public from them. They were, therefore, under no legal liability to anyone who became injured by one of the animals. The summing up E was defective in that it contained no direction to the jury concerning any of the defences put forward by the council.

Sandlands, K.C.: There was ample evidence to justify the verdict. Several witnesses swore that the pen was unsafe, though they said that it appeared safe to those who did not know it. There was also evidence F that the defendants authorised the certifying authority to use these pens when the occasion demanded.

Goddard, L.J.: Assume the facts to have been in the plaintiff's favour: what duty then did the defendants owe to the deceased?

Sandlands, K.C.: It is the duty of the holders of the market to keep G the market in a safe condition for those who come there for any lawful purpose on certain occasions: *Lax* v. *Darlington Corpn.* (5) *per* Bramwell, L.J., at p. 34. Under the elementary principles of the law of torts the defendants were bound to take reasonable care to see that cattle which were assembled upon the highway at their invitation H did not cause unnecessary damage to the persons frequenting the market or passing along the highway in the neighbourhood.

Van Oss: The council invited the owners of cattle to put them into the pens. They owed a duty to the public and to persons using the market to see that those pens were reasonably suitable for preventing the escape of the cattle, or, alternatively, a duty to see that the pens did not deceptively appear safe when in reality they were dangerous, so that persons might be induced to confine cattle in them without taking special precautions. If they failed to perform this duty, they became parties to the assembling of cattle on the highway in such a manner as to be a danger to the public. The council were assembling these beasts, not as a marketing authority, but as a grading authority. Even if they were acting as a marketing authority, their exemption from liability for common law nuisance extended only to the nuisance occasioned by the obstruction which their market created. It did not absolve them from the duty to take all reasonable steps to prevent danger to the public.

SLESSER, L.J.: Under the provisions of the Livestock Industry Act, 1937, it is possible for purchasers of certain classes of cattle to obtain subsidies under conditions which are provided by statutory rules and orders made under that Act. The Cattle Subsidy Scheme, 1937, Schedule, para 1, provides as follows:

> (1) Every producer of fat cattle who desires to claim subsidy payment in respect of an animal or carcase of an animal in accordance with the provisions of the Act shall present the animal for certification at a place approved for the purpose (hereinafter referred to as a "certification centre").

It appears that as early as Aug. 29, 1934, in order to comply with provisions of an earlier Act—namely, the Cattle Industry (Emergency Provisions) Act, 1934—the Spalding Urban District Council had applied to the Cattle Committee under that Act for approval of the Spalding Market as a certification centre in accordance with the then existing requirements, and that approval was then given. That approval has been continued under the Act of 1937, and, therefore, it appears that the Spalding Market is a certification centre within the meaning of the Livestock Industry Act, 1937. It is also required for the purpose of that certification that the place where the animals are to be examined shall be equipped with adequate penning accommodation for cattle, and various other matters. I quote from para. 5 of the scheme.

On Apr. 12, 1938, one Proctor, who is a farmer near Spalding, desired to send a number of steers to be graded under the scheme to which I have referred. One of the beasts was to be sold, but with that we are not necessarily concerned. He therefore caused these animals to be taken into Spalding on that occasion by a man named Pentelow, who was in his employment, assisted by a lad named Walton. The grading of these animals, which involves their first being weighed and then examined, was to begin at 2 p.m. The animals arrived about midday, and, there being no particular accommodation for them, they were, as is stated by Bates (who was in charge of the centre), put into a pen which was ordinarily used for the purposes of a normal market day. Pentelow says that he remained in charge of the animals while they were in the pen. His actual statement is that he was told by Bates to put them in a pen. The pen into which these animals were put consisted of permanent obstructions to their escape on three sides, while in front there was a chain. He says that he is not quite sure who put up the chain, but somebody put it up. His evidence was as follows:

> Did you stand near where the pen was, after that?—I stood there, minding them.

Then the next thing which is material is that this chain sagged and one of the steers nipped out (to use the witness's expression) underneath it. He says that up to that time the animal was quite normal and kindly. It ran away. There was waiting at the market to meet these beasts Frank Brackenborough, the husband of the plaintiff, who was the foreman in the employ of Proctor, the farmer. Unfortunately, when chase was being given to this animal, the animal knocked down Brackenborough, who subsequently died. The widow, proceeding under the Fatal Accidents Act, and also under the Law Reform (Miscellaneous Provisions) Act, 1934, sued the Spalding Urban District Council as the highway authority for the town of Spalding and as the owners of the market. The action against them was in the statement of claim stated in this way, being first founded in negligence:

> It was the duty of the defendants . . . to provide a market which was not dangerous to persons using the same or to persons frequenting the said market place and/or the adjoining highways . . . to take all reasonable precautions to prevent cattle escaping in the said market place and/or causing danger to persons or property on or adjoining the highway.

Then there is an allegation that they failed in that duty, that the cattle pen provided by them was dangerous and defective, and that the sides consisting of chains were slack, or not securely fastened, or inadequate and insufficient. Then the case was put alternatively in nuisance.

When the case came on for trial, evidence was given on behalf of the plaintiff as to the facts which I have stated, and it was put to the judge for submission to the jury that, on this evidence, among other matters, it should be held by the jury that the urban district council had been negligent and had failed to take the proper precautions to restrain these cattle, which they had invited to be placed in one of their pens, and, as I understand, upon the basis that Brackenborough was to be regarded as any other member of the public—namely, as a person entitled to be protected from the negligence of the defendants. No point was made of the fact that Proctor was paying either 1*s.* for the weighing of these animals or 6*d.* for their being penned and 6*d.* for their being weighed. Brackenborough, it was said, had, as a member of the public, been injured by the negligence of the defendants.

At the end of the plaintiff's case, there was really very little dispute on the facts. It appears that these pens were of three kinds. Some, as appears from the plan of the market, were completely and permanently enclosed, others were open at one end, and the third set, with one of which we are here concerned, were enclosed by means of chains. There was some discussion whether those chains were for the purpose of keeping in the beasts or for preventing motor cars from parking in the pens.

However that may be, a submission was made on behalf of the defendants at the end of the plaintiff's case that there was no case to answer, and that the matter should be withdrawn from the jury. The judge, however, declined to withdraw the case from the jury, and, after further evidence had been led, he summed up to the jury. In the result, the jury found for the plaintiff, and gave considerable damages, both under Lord Campbell's Act, and also in respect of loss of expectation of life—namely, £1,045 under Lord Campbell's Act, being £795 to the widow, £250 to the son, and another £500 to the widow in respect of loss of expectation of life.

Counsel for the appellants says here that, when the case is examined, as a matter of law the judge was wrong in leaving this case to the jury, and that no duty can be found, on the facts of the case, which can make the defendants in any way responsible. In the first place, it is to be observed that it cannot be said, on the facts of this case, that the control and possession of these animals ever passed out of the hands of Proctor. They were Proctor's beasts. Two of his men brought them into this market place. He put them in the pen, and they were at all times entirely under his control. Primarily, therefore, if the beasts escaped and did damage, the person who would be liable to the person so injured would be that one who had the control and possession of these beasts, as in *Deen* v. *Davies* (1), where a man bringing a pony into a town and imperfectly tethering it in a stable was held liable to a woman who was knocked down in the street as the result of the escape of the pony from the stable. However, it is said that over and beyond that there is the further liability here, as I understand it, that the market authority invited the farmer to place his beasts in this pen, inviting him for reward, and that, having undertaken that obligation to provide him with that for which he was willing to give payment, they were under an obligation, not only to him, but also to the whole world, to see that this pen was safe. I think myself that some guidance on this question can be obtained from *Knott* v. *London County Council* (2). There a charwoman, employed as a cleaner of a school owned by the defendants, was bitten by a dog which belonged to the school-keeper, who lived on the school premises. He was allowed to keep a dog by the authority of the London County Council, and it is said that he knew that the animal was accustomed to attack mankind. Part of the case turned on the question of how far the school-keeper's knowledge of the fierceness of the dog could be imputed to the London County Council, but, apart from that, there are observations, more particularly in the judgment of LORD WRIGHT, which seem to me to indicate that what has to be looked at primarily is the question of possession and control. LORD WRIGHT says, at pp. 140, 141:

> It is true that the real test of responsibility is not ownership but possession and control; hence in *M'Kone* v. *Wood* (3), LORD TENTERDEN, C.J., in ruling before the jury put as the test whether the defendant was "harbouring the dog." The ruling was a ruling at *nisi prius* and the facts of the case are not very fully or

> precisely stated, but I understand LORD TENTERDEN, C.J., was ruling on a case where a dog was allowed, with the defendant's knowledge, to live on his premises, where it had been left by a former servant on his going away. In such a case it might well be found in fact that there was possession and control in the occupier, there being no one else on the premises to exercise control or claim possession.

Then he also mentions *North* v. *Wood* (4), where, a dog being owned by a
A man's daughter, the father paying for the food and the licence, and the dog and the daughter both living with the father, the father was none the less held not liable for the dog, though he knew it to be savage, because in fact it was under the control of the daughter. In this case, I can see no reason to suppose that this local authority in any way
B accepted any responsibility or harboured, or had any measure of control over, these beasts at all. All that was done by them was this. Proctor and others being willing to bring their beasts into a convenient place which had been approved by the competent authority as a certification centre, the Spalding Urban District Council (who undoubtedly, as regards
C ordinary marketing, had the privilege of a market, and this occasion was market day) allowed the animals to be brought there, and it is said that the urban district council were immune from any liability in nuisance for allowing animals or people to form a concourse on the highway or for private pens which persons could use if they wished to do so. I cannot
D see that, in those circumstances, they were any more liable if these beasts got loose and ran away than they would have been if they had not provided the pens at all. It was not the pens as such which caused this steer to run away, as I understand it. It was the unnatural surroundings, and the fact that it found itself in the market place in a town when it
E was accustomed to standing quietly in a field. At any rate, there is no evidence whatever that the pen as such incited this animal to run away. I find it difficult to understand the principle upon which this case can be put. The class of case cited to us by counsel for the respondent, deciding that, where a person has an obligation to the public, he cannot
F be released from that obligation by handing over the performance of the obligation to a subcontractor, seems to me to have nothing to do with the present case at all. Here we have no more than this. The farmer retains control of his beasts. He brings them to a place at which (whether because it was a market or whether because it was a certification
G centre recognised under the statute matters not) the Spalding Urban District Council could allow these animals to assemble without any risk of anybody complaining that they were constituting a nuisance. Having done that, the urban district council have no control whatever over these animals, any more than the London County Council had in
H *Knott* v. *London County Council* (2), when it permitted the school-keeper to keep a dog. There it was held that the mere permission of the London County Council to the school-keeper to keep the dog did not render them liable for anything which the dog might do. Here also the mere permission given by the Spalding Urban District Council for these animals to congregate in their market does not seem to me to make them

responsible if those animals get away. Once more, to quote Lord Wright in *Knott* v. *London County Council* (2), at p. 142:

> . . . the respondents were not concerned with the dog and had neither property in nor possession of it and made no use of it. . . .

I would add, in conclusion, only that, to my way of thinking, it is a matter of indifference whether these animals in the pens on market day at this time waiting to be graded were regarded as in a market or in a certification centre. In either case, all that the district council have done has been to permit their highway to be used for the purpose of a market or certification. They have no control and no responsibility. I am assuming for all these purposes that the jury were entitled to find, if the matter was one for them, that the pen was a dangerous and insecure pen. How they arrived at that conclusion I find it difficult to understand, but I am prepared to assume it as a fact. I think that that is immaterial for the purposes of this case, and that the judge, there being no legal duty at all on the council to keep the animals in the pen, ought to have held that the responsibility for these animals remained in the person who possessed the control over them—namely, Brackenborough. The judge was wrong in leaving the case to the jury at all. It follows, therefore, that this appeal succeeds.

MacKinnon, L.J.: I agree. The deceased man was knocked down by a steer running amok through the streets of Spalding, and, as a result, the man's skull was fractured. The plaintiff, his widow, desired to get compensation for his lamentable death. What was her possible cause of action? I think that she had one possible cause of action, and one only. That is illustrated by *Deen* v. *Davies* (1). The headnote there dealing with the facts is as follows:

> No duty is cast upon the owner of an animal *mansuetae naturae*, which is being depastured on land adjoining the highway, to prevent it from straying on the highway, unless it is known to be of vicious habit. But a person who brings an animal on the highway must take reasonable care to prevent it from doing damage to other persons thereon. What constitutes reasonable care is a question of fact in each case, and the standard of reasonable care may not be the same in the country as in a town. In this respect the duty to the public is the same in the case of one who leaves an animal in the street, and of one who places it in a stable or yard adjoining the street without taking proper steps to prevent it from straying into the street, where it would naturally go. In either case the owner is liable for the conduct of the animal if he puts it in a position in which it is likely to cause damage to persons lawfully using the highway.

A more exact statement would refer to the person who has the custody and control of the animal, and, in most cases, that person will be the owner. The plaintiff sues the defendants, the Spalding Urban District Council, who have a market in Spalding. The essence of her claim is, I think, in para. 3 of the statement of claim:

> It was the duty of the defendants and/or it was their duty as holders of the said market and/or as highway authority to provide a market which was not dangerous to persons using the same or to persons frequenting the said market place and/or the adjoining highways and/or it was the duty of the defendants as aforesaid to take all reasonable steps to provide a market which was in all respects free from dangers of which they knew or ought to have known. It was further the duty of the defendants as aforesaid to take all reasonable precautions

to prevent cattle escaping in the said market place and/or causing danger to persons or property on or adjoining the highway.

To succeed against the defendants the plaintiff must show that the defendants had taken over the custody and control of this animal after it had arrived at the market place. Of that, I think, there was no evidence.
A The defendants provided pens where the animals might be stood by their owner for a time, but it is obvious on the facts that, as between the defendants and the owner of the animals, the defendants never agreed to assume the custody and control of them, and so relieve the owner of that duty. In fact, as is obvious on the evidence, it remained the
B duty of the owner through his servants to keep guard over the beasts, and so continue the control which those servants had already exercised in bringing the beasts into the town to the market. There was, I think, no evidence on which it could be alleged that this animal, after being brought into the market, was or became in the custody of the defendants,
C or under their control. In the course of the argument, I suggested a parallel case. Many local authorities provide parking-places for motor cars and charge the owners of the cars a fee for that service. Suppose such a parking-place were on a slope, and a car left insecurely braked in the parking-place started to run down the slope and injured a passer-by
D on the highway. If the victim of that accident sued the local authority, alleging that it was their duty to take all reasonable precautions to make the parking-place safe, and to prevent cars running away from it, I think that he would fairly obviously fail in that claim. Personally, I can see no difference in principle between that case and the present case.

E I add only one thing. I have so far spoken of the deceased only as if he were an ordinary member of the public using the highway. In fact, the deceased was the chief of those three servants of the farmer, the owner of these cattle, who had brought them to the market. That fact does not give the plaintiff, the administratrix of the deceased, any better or
F greater right than that which she would have had if the deceased had been an ordinary member of the public. If it had any effect, it might be to give the plaintiff a diminished right, for it might be said that the deceased, along with his fellow-servants, failed to exercise due diligence, in keeping the animals under control and so preventing them
G from escaping from the pen. However, that aspect of the case is not really material. I think that the plaintiff failed to establish the breach by the defendants of any duty which was owed by them to the deceased, and that, therefore, this appeal succeeds.

H Goddard, L.J.: I agree, and have nothing further to add.

Appeal allowed and cross-appeal dismissed.

Solicitors: *J. D. Langton & Passmore*, agents for *Mellows & Sons*, Peterborough (for the appellants); *Lee, Bolton & Lee*, agents for *Edmund W. Roythorne*, Spalding (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

SCOTT *v.* FRANK F. SCOTT (LONDON), LTD., AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), **January 11, 12, 15, 16, 1940.**]

Companies—Shares—Restriction on transfer—Transmission—Construction of articles.

Companies—Articles of association—Rectification of mistake—Equitable jurisdiction of court to rectify documents—Whether applicable to articles of association—Companies (Consolidation) Act, 1908 (*c.* 69), *s.* 14.

The plaintiff was the sole executrix and beneficiary under the will of her husband, who had held 100 ordinary shares in the defendant company, the remaining ordinary shares being held by his two brothers, the personal defendants to this action. The plaintiff asked for a declaration that she was entitled to have her name entered on the register of members of the defendant company as the holder of these shares. The personal defendants counterclaimed for a declaration that they were entitled, upon the true construction of the company's articles, to acquire these shares at par, or, alternatively, they claimed for rectification of the articles so as to give them the right so to acquire these shares. Art. 11 provided that no share should be transferred to a person who was not a member, and art. 18 provided that all ordinary shares of a deceased member should be offered to the principal shareholders :—

HELD : (i) there was no ground for not giving the words in art. 18 the meaning which, *prima facie*, they had, and, as a matter of construction, the plaintiff's claim failed.

(ii) the personal defendants were, upon the construction of the articles, entitled to a declaration that the plaintiff was bound to offer them the shares at par.

(iii) the court has no jurisdiction to rectify articles of association even although it should be proved that they do not accord with what is proved to have been the concurrent intention of the signatories at the moment of their signature.

Evans v. *Chapman* (1) *followed.*

[**EDITORIAL NOTE.** The first point is one of construction only, but the second raises the question whether the remedy of rectification is available in the case of the articles of association of a limited company. This question was answered in the negative some years ago, and the judge has followed that decision.

AS TO RECTIFICATION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 140-143, paras. 197-200 ; and FOR CASE, see DIGEST, Vol. 9, p. 557, No. 3691.]

Case referred to :

(1) *Evans* v. *Chapman* (1902), 86 L.T. 381 ; 9 Digest 557, *3691.*

ACTION claiming a declaration that the plaintiff was entitled to be entered upon the register of members of the defendant company as the holder of 100 ordinary shares in respect of which her husband of whose estate she was sole executrix and beneficiary, was so registered prior to his death. She further claimed that certain resolutions were invalid, but this matter was settled out of court. The personal defendants counterclaimed for a declaration that, upon the true construction of the articles, they were entitled to acquire these shares from the plaintiff at par, or, alternatively, for rectification of the articles so as to give them this right.

D. Llewelyn Jenkins, K.C., and *A. F. Maurice Berkeley* for the plaintiff.

Charles E. Harman, K.C., and *E. M. Winterbotham* for the defendants.

Bennett, J.: Frank F. Scott (London), Ltd., was incorporated on Oct. 12, 1926, as a private company, and its incorporation was effected under the Companies Acts, 1908-1917. It had a share capital of £10,500, divided into 10,200 preference shares of £1 each and 300 ordinary shares of £1 each, and to the preference shares there were attached, by the
A memorandum of association, these rights:

> (1). The holders of the said preference shares shall be entitled to a fixed cumulative preferential dividend at such a rate as shall after deduction of income tax at the rate for the time being in force yield a clear £15 net per centum per annum on the capital for the time being paid up on the said preference shares. (2). The holders of the said preference shares shall in a winding up have priority as to return
> B of capital and payment off of arrears of the said preferential dividend, whether declared or earned or not up to the commencement of the winding up over all other shares in the capital for the time being of the company, but shall not have any further right to participate in profits or assets.

The company was formed to take over a business of shipping butchers carried on in partnership in London by three brothers, the two personal
C defendants and one Frank Stanley Scott. Frank Stanley Scott and Reginald Scott were also interested in a similar kind of business carried on in Liverpool. The business, to carry on which the defendant company was formed, was, immediately before the defendant company was formed, being managed on behalf of the partnership by the defen-
D dant Stuart Scott. I said it was a private company, and it adopted as its articles of association Table A in the First Schedule to the Companies (Consolidation) Act, 1908, with certain modifications and the whole of the share capital, both preference and ordinary, was issued to the three brothers Frank Stanley Scott, Reginald Scott and Stuart Arthur Scott
E in equal shares. Each had one-third of the 10,200 preference shares and each had 100 ordinary shares allotted to him.

The plaintiff is the widow of Frank Stanley Scott, who died on Sept. 10, 1937, and she is the sole executrix of his will and, as I understand, the sole beneficiary under it, and she is, under his will, entitled
F to all his preference shares and to all his ordinary shares. There is no question between the parties with regard to her rights to the preference shares, but in regard to the ordinary shares she claims, as I have said, the right to be placed upon the register of members in respect of them. The personal defendants, on the other hand, claim that under the articles
G of association, she is bound to offer to them the testator's ordinary shares and that they have the right to acquire these ordinary shares at par.

The articles of association by which the company is governed and which are relevant for the purpose of determining whether, as a matter
H of construction, the view advanced by the plaintiff is right or whether the view advanced by the defendants is right, are to be found in arts. 10 and 20 of the articles of association of the company and in cls. 21 and 23 of Table A. It is perhaps necessary, before considering the terms of those articles and clauses, to observe that the control of the company is in the hands of the ordinary shareholders, the preference shareholders

only having a right of voting at a general meeting upon some or one of the questions following, that it is to say, reduction of capital, winding up of the company, sanctioning a sale of the undertaking or altering the regulations of the company so as to affect directly the rights of the preference shareholders. Those are the provisions of art. 23. The first of the articles of association which has to be considered, art. 10, is only relevant because it contains in it a definition of the expression "the principal shareholders," an expression which finds a place in the relevant articles, and that expression is defined in art. 10 as meaning and including those members who respectively hold at least 20 per cent. of the issued ordinary share capital.

Arts. 11, 12 and 13 are in the following terms:

> 11. Save as hereinafter provided, no share shall be transferred to a person who is not a member.
>
> 12. Any member or other person entitled and proposing to transfer any shares (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice") to the company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value of the share or shares included therein, and shall constitute the company his agent for the sale of the same at the price so fixed or in the case of preference shares at the option of the purchaser or purchasers at the fair value to be fixed by arbitration in accordance with these articles. In the case of ordinary shares the purchase price in the absence of agreement shall be par. The transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.
>
> 13. The shares comprised in any transfer notice shall be offered in the first place to the principal shareholders and such offer shall be made to them collectively and individually but so that in case of competition they shall rank for acceptance *pari passu* in proportion to the ordinary shares held by them and so that if any shares cannot be so apportioned such shares shall be offered to them in order determined by lot and the directors shall cause lots to be drawn accordingly and any shares not taken up by the principal shareholders as aforesaid shall be offered to the other members in such order as shall be determined by lot.

It is plain on those articles that, so far as transfer by members on the register is concerned, any member desiring to transfer shares must in the first place give the principal shareholders the opportunity of acquiring them, and, if they are ordinary shares, in the absence of agreement, the price at which the principal shareholders may acquire them is at par.

Then in art. 14 there are provisions which bind or enable to be bound a person who desires to become a purchaser of the shares offered or comprised in the transfer notice. In art. 15 there are provisions enabling in the case of preference shares, if there should be a difference between the proposing transferor and the person who desires to buy as to the price, the price to be fixed by reference subject to or under the provisions of the Arbitration Act, 1889. In art. 16 are the usual provisions for enabling, in case a purchaser makes default, a contract to be completed and in art. 17 is to be found the first relaxation of the rigour of art. 11 against transfer to a person who is not a member. Art. 17 is as follows:

> If the company shall not, within the space of twenty-eight days after being served with the transfer notice, find a member willing to purchase the shares, and give notice in manner aforesaid, the proposing transferor shall at any time within three calendar months afterwards be at liberty, subject to cl. 20 hereof, to sell and transfer the shares or those not placed to any person at any price.

Art. 18 is the article which gives rise to the dispute between the parties, and it deals with two matters or, perhaps, three. It is, I think, the first article which deals with transmission of shares as contrasted with transfer of shares, the articles I have already read being confined exclusively to transfer. It is necessary in connection with art. 18 to read cll. 21 and 23 of Table A. Clause 21 is as follows:

> 21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

That clause establishes as against the company the title of an executor or administrator to the shares of a deceased member but does not give the executors or administrators of a deceased member any right to have his or her name put upon the register of members as the holder of a share.

Clause 23 provides as follows:

> 23. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

So that under that clause an executor not on the register is entitled to dividends and other advantages which he would have had if he had been entered upon the register as a member.

Art. 18 is as follows:

> Any preference share of a deceased member may be transferred by his executors or administrators to any son, daughter, grandson, granddaughter, or other issue nephew, niece, son-in-law, widow or widower of such deceased member (to whom such deceased member may have specifically bequeathed the same).

That is the second relaxation of the rigour of art. 11, a relaxation in respect to the preference shares, and enables those shares to be transferred by a person not himself necessarily a member, that is to say, by the executors or administrators of a deceased member, to the specified relations who need not be members. The article proceeds:

> and preference shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustee for the time being of such will, and cl. 20 hereof shall not apply to any transfer authorised by this clause.

Down to this point there has been no provision in the articles for putting upon the register of members as the holder of preference shares the trustee of the will of a holder of preference shares, but the article plainly, I think, contemplates that such a person shall have had his name placed upon the register in respect of such shares, because the article provides that preference shares standing in the names of the trustees may be transferred upon any change of trustees to the trustee for the time being of such will. Then there follows in the article the words which are the words on which the whole question in the action turns:

> but all ordinary shares of a deceased member shall be offered to the principal shareholders pursuant to the provisions of cll. 12 and 13 hereof.

I should have thought myself, upon the articles down to that point, that the matter really was not open to serious doubt. The contrast between the provisions in regard to the preference shares and those in regard to the ordinary shares in the same article would, to my mind, make it clear that, so far as ordinary shares are concerned, the words in the article mean what they say, that where the holder of ordinary shares has died the ordinary shares are to be offered to the principal shareholders of the company pursuant to the provisions of cll. 12 and 13 hereof.

The next article is art. 19, which is as follows :

> Clause 22 of Table A shall not apply.

They have already by art. 1 excluded cl. 22. In art. 19, there is a repetition of the exclusion of cl. 22 of Table A, and perhaps it is necessary to have in mind what that clause is :

> Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made ; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

The article deliberately excludes, and for the second time, the clause which gives a person becoming entitled to a share in consequence of the death of a member the right to be entered on the register. Then art. 19 proceeds as follows :

> Without prejudice to the provisions of cl. 18 hereof any person who shall have become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, if he shall not be registered as a member as provided by cl. 21 of Table A transfer the same in manner provided by and subject to the conditions contained in cll. 11 to 16 inclusive of these articles.

In the first place, the article is expressed to operate without prejudice to the provisions of cl. 18, and the question is what that phrase means, upon the construction of these articles. I think it can only mean this in these articles without affecting or modifying the provisions which are to be found in art. 18, and there is, in my judgment, nothing in this article which affects what, having had art. 18 read, and having had it read more than once, seems to me to be the clear meaning of it with regard to the ordinary shares of a deceased member. However, the suggested difficulty, if there was any, of giving effect to what, in my judgment, upon these articles, is their clear meaning, is a decision of the Court of Appeal upon the articles of a company formed to take over the Liverpool business, and formed after the incorporation of the London company on May 19, 1927, with somewhat similar articles.

The articles of the Liverpool company have received the consideration of the Court of Appeal, and have been the subject of a decision of the Court of Appeal, and the articles of F. Scott & Co. (Liverpool), Ltd., were construed by the Court of Appeal as not giving to the principal shareholders in that company the right to acquire or to have offered to them the ordinary shares of a deceased member being the holder of those shares. Of course, if the two sets of articles had been identical, I should have been bound by, and would have followed, the decision of the Court of Appeal. I should be bound to do so, but I venture to think that, if, in what seems to me to be the most material respect, there is a difference in the two sets of articles, I cannot be bound by that decision. There is, in my judgment, between the articles which the Court of Appeal had to consider in the Liverpool case and the articles which I have to consider in the London case one word which is contained in art. 18 which makes all the difference between the proper construction of the two sets of articles.

Art. 18 of the articles of association of the Liverpool company, which deals with the transfer and transmission of shares is as follows :

> Any preference share of a deceased member may be transferred by his executors or administrators to any son, daughter, grandson, granddaughter, or other issue, nephew, niece, son-in-law, widow, or widower of such deceased member (to whom such deceased member may have specifically bequeathed the same).

So far the articles are identical. In the Liverpool case the article proceeds as follows :

> and shares standing, [not " and preference shares "] in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustee for the time being of such will.

Upon that article the Court of Appeal came to the conclusion that, as a matter of necessary implication, the ordinary shares must have been put into the names of the trustees of the will, and, therefore, it was a matter of necessary implication that the trustees of the will had the right to be put upon the register in respect of ordinary shares. However, the words of the article which I have to construe are wholly different, and, in my judgment, there is no room for any such implication, and for that reason I cannot conceive that I am bound by the decision of the Court of Appeal in a case in which, on different language, they had come to a clear conclusion that the articles of association meant what they said, and there is no ground for not giving the words in art. 18 :

> but all ordinary shares of a deceased member shall be offered to the principal shareholders pursuant to the provisions of cls. 12 and 13 hereof.

the meaning which those words, *prima facie*, have. There is no ground upon which, in my judgment, I can come to a conclusion that those words were intended to have any operation other than some cautionary operation, or as being words warning those who read the articles of that provision of art. 11.

For these reasons, as a matter of construction, in my judgment, the plaintiff's claim for a declaration that, in the events which have happened, she is entitled to be placed upon the register of members in respect of the ordinary shares of the defendant company, of which Frank Stanley Scott deceased was registered as holder, fails, and it follows that her action must be dismissed.

The defendants' counterclaim asks that, upon the true construction of the articles of association of the defendant company, the plaintiff is bound to offer the 100 ordinary shares, of which Frank Stanley Scott is the registered proprietor, to the defendants Stuart Arthur Scott and Reginald Scott in manner provided by arts. 12 and 13. In my judgment, upon the counterclaim the defendants are entitled to that declaration, that being, in my judgment, the meaning and effect of these articles of association, and, in particular, of art. 18.

There remains the question of counterclaim, which raises interesting points of law. I suppose (indeed, it is perfectly certain) that this matter will not remain in this court and that the plaintiff will go to the Court of Appeal. There, of course, my judgment may be reversed, and then it will become necessary for the court to consider the claim by the defendants to have the articles of association rectified. With reference to the first question upon the counterclaim of the defendants to have the articles of association rectified, the first objection taken by counsel for the plaintiff, is that the equitable jurisdiction of the court of equity to rectify instruments does not extend to articles of association, and that that proposition is based upon the provisions to be found in some of the sections of the Companies (Consolidation) Act, 1908, Part I, under the authority of which the defendant company was registered, and it is necessary to consider the statutory provisions.

The first provision is the one in sect. 2, which enables individuals, natural persons, to bring into existence the ordinary features of a corporation. That section provides that:

> Any seven or more persons (or, where the company to be formed will be a private company within the meaning of this Act, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability . . .

Then there follows in the section a reference to the three kinds of incorporated companies which may be brought into existence, companies with limited liability to the amount unpaid on the shares, companies limited by guarantee and unlimited companies. Sect. 3 (1), para. 3, provides that the memorandum must state the objects of the company. Sect. 4 is not material. Sects. 6 and 7 provide as follows:

> 6. The memorandum must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.
>
> 7. A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

Sect. 9 provides that however a company may alter the provisions of its memorandum and in what respects a company may alter the provisions of its memorandum, the alterations shall not take effect until, and except in so far as, they are confirmed on petition by the court, and the section goes on to provide that an office copy of the order confirming the alterations shall, with a printed copy of the memorandum as altered, be delivered to the registrar of companies, and he shall register the same and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of the Act with respect to the alteration and confirmation thereof have been complied with.

Articles of association are first dealt with in sect. 10, which provides that:

> A (1) There may, in the case of a company limited by shares, and there shall in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company. (2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule to this Act.

Sects. 11 and 12 are as follows:

> B 11. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.
>
> 12. Articles must—(*a*) be printed; (*b*) be divided into paragraphs numbered consecutively; (*c*) bear the same stamp as if they were contained in a deed; and C (*d*) be signed by each subscriber of the memorandum of association in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

Then follow in sect. 13 provisions with regard to the alteration of articles of association by special resolution.

D Sects. 14, 15, 16 and 17 are as follows:

> 14. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.
>
> 15. The memorandum and the articles (if any) shall be delivered to the registrar E of companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

What he retains is the document to which the signatories have put their signature, and that is the physical thing he retains and registers.

> F 16. (1) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited. (2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands . . .
>
> G 17. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

Those, I think, are all the relevant provisions in the statute.

H So far as authority is concerned, during all the years since 1862, when the first Joint Stock Companies Act was passed, there has apparently been only one reported case in which the question whether articles of association could be rectified has been considered, and that is the case of *Evans* v. *Chapman* (1). In that case JOYCE, J., refused to rectify articles of association in a case in which it had been plainly proved that there was a mistake in them. The articles of association of a public company contained as one of its articles an article which provided that:

> If the company shall offer any of its shares to the public for subscription: (a) The directors shall not make any allotment thereof unless and until at least 7 per cent. of the shares so offered shall have been subscribed, and the sums payable on application shall have been paid to and received by the company.

There was clear proof in the case of *Evans* v. *Chapman* (1) that the words "per cent." had been inserted in the article as printed by mistake. Nevertheless Joyce, J., refused to rectify them. The matter came before him in rather a curious way. An action was begun by one of the seven signatories to the memorandum and articles against the other six and against the company, and in that action a motion was made for some interlocutory relief. I do not know what interlocutory relief there was, or what it could have been, or how it could have been anything except the relief to which the plaintiff, who was entitled to it, would be entitled at the trial of the rectification action, obviously a matter, I should have thought, for interlocutory relief, but the matter was argued and Joyce, J., is reported as having said this, at p. 382:

> I do not see my way to make the order asked for. No doubt a blunder was made in drafting the articles, but that can be rectified under the provisions of the Companies Act, 1862, s. 50, and is the proper way of doing it

as if the signatories had passed the special resolution to alter the articles

> With reference to the jurisdiction to rectify such a document, counsel have not had much time or opportunity to look into the authorities on the subject; but on the materials before me and as at present advised, I am of opinion that the general jurisdiction of the court to rectify instruments has no application to a document of this kind, which has only a statutory effect, and can only be rectified by statutory authority.

It is said on behalf of the defendants, the plaintiffs in the counterclaim, that that language is so guarded that it ought not to be taken as an authority in favour of the proposition that there is no jurisdiction to rectify articles of association. Of course, it is plain that Joyce, J., did use very guarded and qualified language, but it does nevertheless express the view that the general jurisdiction of the court to rectify instruments has no application to articles of association. That is the only authority.

Looking at the matter apart from authority, in my judgment, the arguments advanced by counsel for the plaintiff are to be preferred to those advanced by counsel for the defendants. The Act says in sect. 14 that articles of association, when registered, shall bind not merely the persons who put their signatures to them, but the company, the company which had no existence at the time when by mistake, if they did make a mistake (and for this purpose I assume they did), those who put their signatures to the articles of association omitted to make in them a certain provision. How can their mistake be put right as against the company which, when they made their mistake, had no existence at all, when the Act says that the articles, when registered, shall bind the company? It seems to me that the effect of the Act upon the company as stated in sect. 14 is in effect to exclude from applying to articles of association the jurisdiction of the court in regard to rectification.

There are these further difficulties, apart from the language of sect. 14, which occur to one. If rectification should have been ordered, the court ought to see that the articles of association, which are the articles registered with the registrar, are made to conform with the court's order. The registrar is not before the court. There is no jurisdiction in the court to order the registrar of joint stock companies to correct the articles of association registered with him under the Act, and it would be idle, I think, for this court to make an order which this court has neither the means nor the power of enforcing. Wherever the memorandum is altered as the result of an order of the court, for instance, where the objects of a company are altered or where the capital of a company is reduced, the Act contains provisions authorising, or, indeed, compelling, the registrar to make a note upon the register of the order which the court has made in regard to those matters, and, when one considers the provisions of sect. 243 of the Act of 1908, provisions which have found their way into the Companies Act, 1929, to the effect that the register is open to inspection, that copies of the documents on the register can be obtained by members of the public and that copies certified by the registrar to be true copies are admissible in legal proceedings as legal evidence, it is of vital importance, if the articles of association are to be rectified, that the file should be altered so as to conform to the court's order. There is no machinery for that. For these reasons, in my judgment, the court has no jurisdiction to rectify articles of association, even although it should be proved that the articles of association do not accord with what is proved to have been the concurrent intention of the signatories at the moment of their signature.

In this case, so far as the facts are concerned, I think it has been proved by the documents which have been put in, letters or copies of letters passing between the three brothers and the company, that it was the intention of the three brothers that these articles of association should contain a provision that the ordinary shares held by a deceased member should be offered to the principal shareholders defined by the articles at par, and, apart from this technical difficulty of being unable to rectify articles of association, I should have been of opinion that the defendants had proved the facts necessary to support an action for rectification if I had come to the conclusion that, as a matter of construction, the articles did not give the principal shareholders the right to acquire from a deceased shareholder his ordinary shares.

For these reasons, in my judgment, the defendants' counterclaim succeeds in so far as they ask for a declaration as to the construction of the articles, but fails in so far as they ask for the articles of association to be rectified. I think that the proper order as to costs is that the action fails and must be dismissed with costs. So far as the counterclaim is concerned, I think justice will be done by ordering the plaintiff to pay to the defendants one half of the costs of their counterclaim, and I make a declaration on the counterclaim.

Action dismissed with costs. Counterclaim allowed in so far as it asked for a declaration of the construction of the articles, but dismissed in so far as it asked for rectification of the articles. Plaintiff to pay the defendants half the costs of their counterclaim. A

Solicitors: *Field, Roscoe & Co.*, agents for *Guy Williams & Co.*, Liverpool (for the plaintiff); *Layton & Co.* (for the defendants).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

B

R. *v.* DAY.

[Court of Criminal Appeal (Lord Hewart, L.C.J., Hilbery and Hallett, JJ.), **January 24, 1940.**] C

Criminal Law—Evidence—Admissibility—Evidence called by prosecution at judge's suggestion after close of case for defence—No case of surprise.

The appellant was convicted of forging a cheque for £5. The prosecution's case depended entirely upon the evidence of an accomplice, D., who had been convicted previously of the theft of the cheque form used in the commission of the forgery. The prosecution also produced two letter-cards, and it was admitted that the handwriting upon these was the genuine handwriting of the appellant, and, in answer to a contention of counsel for the appellant that there was no corroboration of D.'s evidence, it was submitted that corroboration was to be found in the letter-cards. Thereupon the appellant was called, and gave the only evidence for the defence, which consisted of a complete denial of the forgery. The case was then adjourned, and, at the resumed hearing, the judge, on the application of counsel for the prosecution, admitted evidence of a handwriting expert to say that there were similarities between the known genuine handwriting of the appellant and the handwriting of the signature on the cheque. It was contended by the appellant that this evidence was wrongly admitted:— D E

Held: the evidence was wrongly admitted as it was not evidence upon any matter which arose *ex improviso*, or evidence the necessity for which no human ingenuity could have foreseen, but was evidence the necessity for which was obvious from the commencement of the proceedings. F

[**EDITORIAL NOTE.** The judge at a criminal trial, it is said, may call a witness not called by either side, without their consent, if he considers it to be necessary in the interests of justice. There is, however, a definite and clear limitation upon this discretionary power of the court. After the defence has been closed, no such evidence can be called either by the court or by either party, unless the cause for such evidence is one which no human ingenuity could have foreseen. G

As to Additional Evidence, see HALSBURY, Hailsham Edn., Vol. 9, p. 170, para. 246; and for Cases, see DIGEST, Vol. 14, p. 267, Nos. 2731-2734.] H

Cases referred to:

(1) *R.* v. *Baskerville*, [1916] 2 K.B. 658; 14 Digest 463, *4934*; 86 L.J.K.B. 28; 115 L.T. 453; 12 Cr. App. Rep. 81.

(2) *R.* v. *Harris*, [1927] 2 K.B. 587; Digest Supp.; 96 L.J.K.B. 1069; 137 L.T. 535; 20 Cr. App. Rep. 86.

(3) *R.* v. *Frost* (1840), 4 St. Tr. N.S. 85; 9 C. & P. 129; 14 Digest 362, *3827*.
(4) *R.* v. *McMahon* (1933), 24 Cr. App. Rep. 95; Digest Supp.
(5) *R.* v. *Liddle* (1928), 21 Cr. App. Rep. 3; Digest Supp.

APPEAL from a conviction on the ground of wrongful admission of evidence. The facts and arguments are fully set out in the judgment A of the court delivered by HILBERY, J.

W. St. J. C. Tayleur (for *Cyril Harvey* on war service) for the appellant.

P. H. Thorold Rogers for the Crown.

HILBERY, J. [delivering the judgment of the court]: In this case, B the appellant was convicted on two counts of an indictment which charged him with forging a banker's cheque and causing £5, the proceeds of that cheque, to be paid over. He was sentenced to 18 months' imprisonment with hard labour, and he now appeals on certificate against conviction.

C The case made by the prosecution depended entirely upon the evidence of a witness named Miss Dixon, who had been convicted previously of the theft of the cheque form which had been used and said to have been forged, and who was admittedly an accomplice of the appellant. There was also in the possession of the prosecution certain handwriting D of the appellant. Two letter-cards were produced in the course of the case for the prosecution which were stated to have been received by a police officer from the appellant, and the writing upon those letter-cards was thereafter treated as the genuine handwriting of the appellant. Those letter-cards had been written by the appellant and received by E the police officer before the appellant was charged, and they had been thereafter in the hands of the prosecution.

When the prosecution's case was closed, it depended upon the evidence of the accomplice, Miss Dixon, and counsel for the defence submitted to the judge at the trial that there was no such corroboration of the F evidence of that accomplice as was required by the rule of practice authoritatively stated in *R.* v. *Baskerville* (1). Counsel for the prosecution answered that contention by saying that the only evidence by way of corroboration upon which he could rely was to be found in the handwriting on those two letter-cards, and he suggested that the jury could G be invited to arrive at a conclusion without any positive evidence of a handwriting expert to assist them. The judge then expressed his view that the jury could not be asked to give a verdict without some assistance by way of expert evidence, but he decided that the mere lack of corroboration was not a sufficient ground for him there and then to H withdraw the case from the jury, and that the jury would have to pass their verdict on the evidence subject to his direction, which would be based on the decision in *R.* v. *Baskerville* (1).

Thereupon counsel for the appellant called the appellant into the witness-box and his evidence was heard and received. He was the only witness for the defence, and his evidence was a complete denial that he had written the cheque or signed it. When the case for the defence was closed on the Saturday of the trial, the judge adjourned the case, and, in adjourning it, said this:

> I shall adjourn the case at this point until 11 o'clock on Monday morning. In the meantime the prosecution can consider whether they will or will not make an application to me for leave to tender further evidence, always remembering that, before such an application can be made, notice of any proposed additional evidence must be served upon the defence.

Then, turning to the jury, the judge said:

> I think it is better that we should have this case properly investigated.

On the Monday morning, the prosecution asked permission of the court to call additional evidence, that is to say, the evidence of a handwriting expert to say that there were similarities between the known genuine handwriting of the appellant and the handwriting of the signature on the cheque in question. Counsel for the defence took this objection to that course:

> In my submission, this is a case in which both the prosecution and the defence have closed their case, and nothing has arisen *ex improviso* which could justify the calling of fresh evidence.

It is true to say that he added the words "by your Lordship," who, in the discussion which took place, made it clear that the principle applied whether the fresh evidence was to be called by the court or by the prosecution. The judge overruled that objection and admitted the evidence. In the result, the accused was convicted.

We think that the law is now well decided. It is true to say that, if a question as to the time at which evidence is to be received arises in the course of the trial, it may be that the judge may be called upon to decide the appropriate time, and, in so doing, exercise a judicial discretion. However, this was not such a case. This was a case where all that was being done was to seek to remedy an obvious deficiency in the evidence in support of the case for the prosecution, not only after the case for the prosecution had been closed, but also after the evidence for the defence had been heard, and it was an endeavour to call that supplementary evidence, although the material upon which that evidence was to be given had been in the hands of the prosecution from the beginning. It was evidence upon one branch of the prosecution's case, upon which it must have been realised that they must give positive evidence.

The law has been laid down and expounded in *R.* v. *Harris* (2), where it is said, at p. 594:

> But it is obvious that injustice may be done to an accused person unless some limitation is put upon the exercise of that right, and for the purpose of this case, we adopt the rule laid down by Tindal, C.J., in *R.* v. *Frost* (3) where Tindal, C. J., said: "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so

> arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed,

Counsel for the prosecution sought to say that the rule relied upon for the appellant was confined to cases in which the fresh evidence was
A being called by the judge, but that passage answers that contention and makes the rule apply to evidence called on behalf of the Crown and by the judge. The judge continued, at p. 595:

> and that the practice should be limited to a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue.

B

In other words, the principle is to be applied whether the witness is called by the court or by the Crown. Now that case has been followed and that principle applied twice in this court. It was applied in the case of *R.* v. *McMahon* (4), and that passage to which I have referred was
C there again quoted by LORD HEWART, L.C.J., who gave the judgment in that case, and after quoting that passage, and immediately after the words

> . . . but in order that injustice should not be done to an accused person, a Judge should not call a witness in a criminal trial after the case for the defence is closed except "in a case where a matter arises *ex improviso*, which no human ingenuity can
> D foresee, on the part of the prisoner, otherwise injustice would ensue,"

added these words at p. 97:

> Now in our opinion those conditions were not fulfilled with regard to these witnesses and it follows that the evidence of these six witnesses was, in our view, wrongly admitted.

E

If those words are applied to the case which we have now under consideration, it becomes manifest, I think, that those conditions were not fulfilled in this case. First, the matter whether this handwriting was the handwriting of the appellant—that is, whether his was the hand which
F wrote the forgery with which he was charged—was a question about which from the outset the burden had been upon the prosecution to show that the handwriting was that of the appellant. It was, therefore, evidence concerning material which had been in the hands of the prosecution before the case was heard, and it was evidence the necessity
G of which was obvious from the start. Indeed, the judge had no hesitation in saying that, without it, it was impossible to ask the jury to act as handwriting experts and to pass a verdict which might be a conviction. It cannot be said, in the circumstances, that this evidence was evidence upon any matter which arose *ex improviso*, if those Latin words
H are given the meaning which was originally attributed to them. Nor can it be said that it was evidence the necessity of which no human ingenuity could foresee. It was evidence the necessity of which was obvious. In addition, in this case, the unfortunate thing is that, in the view of the judge at the trial, unless that evidence was given, there was no corroboration of the evidence of the accomplice whose evidence had

been given for the prosecution. It was obvious from the course of the trial that the evidence of the accomplice was not such as the jury could reasonably be expected to accept if it stood alone, and, in our view, without the evidence, which was wrongly admitted, it seems probable that the jury must have acquitted.

That is sufficient to dispose of the matter, but how unfortunate it would be if such a practice as this were allowed to grow up is well instanced and explained by LORD HEWART, L.C.J., in another case in which this principle was being applied, *R.* v. *Liddle* (5), at p. 13 :

> Nothing had suddenly emerged which required the calling of witnesses, and the circumstances in which the witnesses were called were such as gravely to imperil the defence and put the defence to an unfair disadvantage. [I have pointed out that in the circumstances the wrongful admission of the evidence destroyed a defence which otherwise probably would have succeeded.] If the same reasoning were to apply, it would have been perfectly open for the defendant, on the second of these adjourned hearings, to require a further adjournment in order that he might call, in his turn, rebutting evidence, and so the inquiry might wander on indefinitely.

In this case, it would have been open to counsel for the prisoner to ask for a further adjournment on his side, so that he might have an opportunity of consulting a handwriting expert and, perhaps, of calling that handwriting expert on another occasion. The eventuality of experts differing is not unheard of, and so the inquiry might have wandered on. In our view, the necessary conditions which had to be fulfilled before this evidence could be admitted were not fulfilled, and it is impossible to say that, if they had been fulfilled, the verdict of the jury would have been the same. The appeal is allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

GEIRINGER *v.* SWISS BANK CORPORATION.
OESTERREICHISCHE CREDITANSTALT *v.* GEIRINGER.

[CHANCERY DIVISION (Bennett, J.), **November 28, 1939, January 24, 1940.**]

Aliens—Enemy aliens—Right to proceed with action suspended—Security for costs—Safeguarding enemy's claim.

In Apr., 1939, the plaintiff brought an action against a London bank, claiming to be entitled to certain securities in the hands of the bank. The bank interpleaded, alleging that they held the securities for the account of a Viennese bank and that they themselves claimed no interest therein. Thereupon it was ordered that the issue of ownership should be tried between the plaintiff and the Viennese bank and that the latter should be plaintiffs in that issue while the former was to be defendant. After the making of that order, war broke out between this country and Germany, and the defendant in the issue issued the present summons asking for security for costs to be furnished by the plaintiffs in the issue. He also asked for an order that the plaintiffs in the issue be for ever barred from proceeding against the London bank in connection with the matter in dispute :—

HELD : (i) the plaintiffs in the issue would not be ordered to give security for costs, as they were unable to proceed with their claim until after the cessation of hostilities.

(ii) the plaintiffs ought not to be barred from proceeding against the London bank after the cessation of hostilities.

Semble : the defendant in the present issue could be made plaintiff and the Viennese bank defendant in an issue, and the matter could thus be determined before the cessation of hostilities.

[**EDITORIAL NOTE.** The point in this case is purely one of practice, and suggests that, if a party who is not an enemy alien is made plaintiff, the rights of the parties can in some cases be sufficiently determined.

AS TO RIGHTS OF ENEMY ALIENS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 455-457, paras. 771-774 ; and FOR CASES, see DIGEST, Vol. 2, pp. 154-158, Nos. 250-280.]

SUMMONS asking for an order for security for costs against an enemy plaintiff, or, in the alternative, for an order that the enemy plaintiff be for ever barred against the defendant in the action. The facts are fully set out in the judgment.

L. M. Jopling for the plaintiff, the defendant in the issue.

Neil Lawson for the plaintiffs in the issue.

BENNETT, J. : This is a summons by the plaintiff in the action, who is also the defendant in an interpleader issue ordered to be tried by an order made on July 6, 1939. The respondents to the summons are a Viennese bank, Oesterreichische Creditanstalt Wiener Bankverein. They are not parties to the action, but they are the plaintiffs in the interpleader issue. The summons before me asks for the following relief :

> That the plaintiffs in the issue give security for the defendant's costs in the issue to the satisfaction of the master on the ground that the plaintiffs in the issue are out of the jurisdiction of this court and that in the meantime all further proceedings be stayed and for an order that the costs of this application be costs in the issue ; alternatively for an order that the plaintiffs in the issue and all persons claiming under the plaintiffs in the issue be for ever barred against the defendants in the action and persons claiming against the defendants in the action but the order shall not affect the right of the plaintiff and the defendants in the issue as between themselves.

The facts which led up to the summons are as follow. The writ in the action was issued on Apr. 12, 1939, the plaintiff, Ernst Geiringer, being described in the writ as residing in New York, U.S.A. The defendants in the action are the Swiss Bank Corporation, whose address on the writ is stated to be 99, Gresham Street, in the city of London. The relief claimed in the writ is as follows :

> (1) A declaration that the defendants hold the following investments or securities, namely :—£300 sterling 3½ per cent. British war loan ; £200 sterling deferred stock Peninsular & Oriental Steam Navigation Co. ; 400 Atlas Electric and General Trust Co., Ltd. shares of £1 sterling ; £200 7 per cent. cumulative preference shares in the International Nickel Co. of Canada, Ltd. ; 200 7 per cent. second preference stock units Shell Transport & Trading Co., Ltd., of £1 sterling as trustees upon trust for the plaintiff absolutely. (2) An order that the defendants do forthwith transfer or deliver the said investments or securities and/or the proceeds of sale thereof to the plaintiff or as he shall direct. (3) Injunction. (4) Further or other relief.

The writ was served on the defendants on Apr. 12, 1939, and they interpleaded, supporting their claim to interplead by an affidavit made by one Pierre de Wolff, which I will read, beginning at para. (2). Pierre de Wolff is the deputy manager of the London Office of the defendants, and the facts to which he deposes are these :

> (2) For a considerable period previous to July 19, 1938, the several securities mentioned in the indorsement on the writ of summons herein together with £500 Austrian 7 per cent. international loan 1930 (English issue) bonds had been continuously held by the London office of the defendants for the Société de Banque Suisse of Zurich in the Confederation of Switzerland (being the Zurich office of the defendants) in accord with their instructions to hold such securities and bonds for the account of the said Zurich office. (3) By a letter dated July 19, 1938, the said Zurich office instructed the said London office to hold the said investments and bonds for the account of the Vienna office of the claimants, the Oesterreichische Creditanstalt Wiener Bankverein, which is a company originally constituted under the laws of Austria, now incorporated in the Republic of Germany and hereinafter called "the Viennese bank," and having its head seat of control and management in Vienna where it can be lawfully served with legal process . . .

Then he exhibits the correspondence and translations, and continues as follows :

> On July 22, 1938, the said London office of the defendants notified the Viennese bank that they had received and thenceforth held the aforesaid securities for their [the Viennese bank's] account . . .

Then he exhibits some more correspondence, and continues as follows :

> By a letter dated Jan. 18, 1939, the Viennese bank instructed the said London office to ship to them the £500 Austrian bonds mentioned in para. (2) of this affidavit.

The letter of instructions is produced and exhibited. He continues as follows :

> Such instructions were duly carried out by the said London office on or about Jan. 20, 1939. (5) By a letter dated Mar. 18, 1939, the Viennese bank instructed the said London office to sell all the rest of the said securities and to credit their account with the proceeds thereof.

The correspondence containing the instructions is exhibited. He continues as follows :

> In accordance with the last-mentioned instructions the London office of the defendants sold the said investments on Mar. 20, 1939, and on that same date sent to the Viennese bank the relevant credit advice notes concerning the proceeds of such sales. The bundle now produced and shown to me marked "P. de W.5" contains true copies of the said credit advice notes. (6) The proceeds of such sales amounting to the sum of £1,105 13*s.* are now in the possession of the defendants' said London office merged in the general funds standing to the credit of the said claimant's (the Viennese bank's) current account with the defendants' said office. The Viennese bank claims such proceeds. The defendants have no knowledge in regard to the beneficial ownership thereof. (7) The defendants claim no interest in the said sum of £1,105 13*s.* except for their charges and costs, and are ready to bring into court or to pay or dispose of such sum in such manner as this honourable court may order or direct.

Affidavits were filed on behalf of the plaintiff and the Viennese bank, and, having read the affidavits, on July 6, 1939, the master made the interpleader order. So far as it is relevant, the order is as follows :

> It is ordered that the following issue be tried before this court, that is to say : "Whether the plaintiff or the claimants is or are entitled to receive payment and

> give a good discharge for the sum of £1,105 13s. at present in the hands of the defendants representing the proceeds of sale of the securities in the indorsement of the said writ mentioned"; and it is ordered that in the said issue the claimants be plaintiffs and the plaintiff be defendant; and it is ordered that the plaintiffs in the said issue do deliver their statement of claim on or before July 26, 1939, and that the defendant in the said issue do deliver his defence within 14 days after delivery of the statement of claim, and that the plaintiffs in the said issue do deliver their reply if any within 7 days after the delivery of the defence.

A Then there are provisions with regard to the trial of the issue, and the order concludes with these words, so far as the action is concerned:

> That all further proceedings in this action be stayed until after judgment in the said issue.

B War broke out on Sept. 3, 1939, between this country and Germany. Nevertheless, on Oct. 7, 1939, the claimants delivered their points of claim in the issue. Afterwards, on Oct. 17, 1939, the plaintiffs issued the summons now before me. Originally the only order asked for was an order for security for costs. It was not until the summons was before C me on Nov. 28, 1939, that the plaintiffs amended it by asking for the alternative relief.

It is admitted that the plaintiffs in the issue are alien enemies, and, that being so, it is clear that, so long as there is a state of war between Great Britain and Germany, they cannot proceed with their claim. Their D rights are in a state of suspense. That being so, it would, in my judgment, be unfair to them to make now the order for security for costs asked for. They could not comply with it. I also think that it would be unfair to make the order asked for in the alternative. It is true that to make such an order would not determine the rights of the claimants against the E plaintiff in the action. Such an order would leave those rights undetermined and suspended, but it would enable the plaintiff to recover from the defendants the money the subject-matter of the interpleader issue, and such an order would or might adversely affect the position of the claimants, who, after all, may be right. It would leave the claimants F in a position in which they might have to sue the plaintiff in the United States of America. At the moment, the money about which the parties are fighting is in safe hands. I do not know what the financial position of the plaintiff is. He may be a wealthy man, or he may be a poor one. Plainly, I think, it would be unfair to the claimants, before hearing their G case on its merits, to bar their rights against the solvent body which may be their debtor, and substitute for that body the plaintiff, an individual about whom I know nothing, and who, apparently, would have to be sued in the United States of America.

I cannot make the alternative order asked for on the summons, but it H would not, I think, be right or fair to the plaintiff to leave him without a remedy during the war. So to do might harm him if he should be right, and might benefit the alien enemy if he should be wrong. It would be possible to reconsider the order of July 6, 1939, and, notwithstanding that order, if the plaintiff is so minded, to order that in the issue the plaintiff be the plaintiff, and the claimants be the defendants. So framed, the issue could be proceeded with during the war. I understand that the master suggested this course to the plaintiff when the summons was before him, and that the plaintiff then refused to take it. All I can do on this summons is to dismiss it with costs, with leave to the applicant to appeal if he desires so to do.

Summons dismissed with costs. Leave to appeal to the Court of Appeal.

Solicitors: *Donald W. Plunkett* (for the plaintiffs); *Herbert Oppenheimer, Nathan & Vandyk* (for the defendants).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

PRATT *v.* COOK SON & CO. (ST. PAUL'S), LTD.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **December 11, 12, 13, 1939, February 8, 1940.]**

Master and Servant—Wages—Payment otherwise than in coin of the realm—Necessity for written agreement—Agreement between trade union and masters' association—Truck Act, 1831 (c. 37), *ss.* 1, 2, 3, 4, 8, 9, 23—*Truck Amendment Act,* 1887 (c. 46), *ss.* 2, 4, 5, 12.

Limitation of Actions—Specialty—Right of action conferred by statute—Civil Procedure Act, 1833 (c. 42), *s.* 3.

The plaintiff was employed from Mar. 8, 1920, to Dec. 1, 1935, as a packer by a firm of wholesale drapers at a weekly wage of 53*s.*, and it was agreed that dinner and tea supplied by the firm were worth an additional 10*s.* per week. The plaintiff claimed that the above sum of 10*s.* was an improper deduction under the Truck Act, 1831, ss. 3, 4, and that he was entitled to recover the sums deducted as a specialty debt, so that the period for the purposes of the Statutes of Limitation was twenty years. The defendants contended (i) that the deduction was one they were entitled to make under the Truck Act, 1831, s. 23, but to this it was objected that there was no agreement in writing signed by the plaintiff to permit these deductions, and (ii) that certain agreements made between the plaintiff's trade union and the masters' association were sufficient agreements in writing within the Truck Act, 1831, s. 23. These agreements were signed by an official of the union and the association, but the defendants at all times insisted on negotiating with their own men direct:—

Held (Lord Romer dissenting): (i) as part of the plaintiff's wages was not paid in the current coin of the realm, the contract fell within the mischief aimed at in the Truck Act, 1831, s. 1.

(ii) the exemptions provided by sect. 23 of the Act did not apply to sect. 1, and both sections could stand together without any contrariety or overlapping.

(iii) as the plaintiff's claim was brought on sect. 4 of the Act of 1831, and on nothing else, the debt was a specialty debt due under a statute, and, therefore, the proper period of limitation was twenty years under the Civil Procedure Act, 1833, s. 3.

(iv) it must be taken that the plaintiff's wages were 63*s.* per week, and he was entitled to recover 10*s.* in respect of each week for the whole period of his service.

Order of Court of Appeal ([1938] 4 All E.R. 356) *reversed.*

[EDITORIAL NOTE. This case is important in view of the fact that vast sums of money are probably dependent upon the decision. It is also remarkable in that the

statutory provisions here construed concern the payment of ordinary working men, and the courts have not been asked to construe them until 100 years after the passing of the Act. The legal issue, however, is within the narrowest compass. The only question of construction is whether the exceptions stated in sect. 23 of the Act of 1831 apply only to sect. 2 or also to sects. 1 and 3. The suggestion that they were to be read into sects. 1 and 3, which found favour with the majority of the
A Court of Appeal, is here rejected, but the decision is again not unanimous, LORD ROMER dissenting and agreeing with the majority decision in the Court of Appeal. There is a further matter upon the Statute of Limitations, but this is easily disposed of.

AS TO PAYMENT OF WAGES IN KIND, see HALSBURY, Hailsham Edn., Vol. 14, pp. 654-658, paras. 1237-1241 ; and FOR CASES, see DIGEST, Vol. 24, pp. 934-941, Nos. 229-284.]

B Case referred to :

(1) *Williams* v. *North's Navigation Collieries (1889), Ltd.*, [1906] A.C. 136 ; 24 Digest 938, *263* ; 75 L.J.K.B. 334 ; 94 L.T. 447 ; *revsg.*, [1904] 2 K.B. 44.

APPEAL from an order of the Court of Appeal (SLESSER and FINLAY,
C L.JJ., GODDARD, L.J., dissenting), dated Nov. 11, 1938, and reported [1938] 4 All E.R. 356, reversing an order of WROTTESLEY, J., dated Feb. 11, 1938, and reported [1938] 1 All E.R. 555. The facts and the arguments are fully set out in the opinion of LORD ATKIN.

H. J. Wallington, K.C., and *A. Melford Stevenson* for the appellant.

D *Rt. Hon. Sir William Jowitt, K.C.*, *G. O. Slade* and *Victor Wolff* (for *Charles M. Cahn* on war service) for the respondents.

LORD ATKIN : My Lords, this is an appeal from the Court of Appeal, who by a majority (SLESSER and FINLAY, L.JJ., GODDARD, L.J.,
E dissenting) set aside a judgment of WROTTESLEY, J., in favour of the plaintiff and entered judgment for the defendants. The plaintiff's action was under the Truck Act, 1831, s. 4, to recover from the defendants, his former employers, arrears of wages at the rate of 10*s.* per week not actually paid to him in current coin. It is plain from the
F facts found by the judge, and it is not now disputed, that part of the plaintiff's remuneration as a packer in the employment of the defendants consisted of the provision of dinner and tea at the value of 10*s.* per week. The plaintiff was an artificer within the meaning of the Truck Act, 1831, and, therefore, in apparent violation of sect. 1 of the Act,
G his wages were not "made payable in current coin of the realm and not otherwise," and apparently, therefore, he had the right to recover so much of his wages earned as were not so paid to him. On the question of liability, the only question is whether sect. 23 of the Act operates as an exception to the general prohibition in sect. 1.

H It is not necessary to dwell upon the evils which led to the passing of the Truck Act, 1831. The practice of paying wages in kind had been an abuse for centuries, and a series of Acts dating from 4 Ed. IV had been passed prohibiting such payments in particular trades. By 1 and 2 Will. IV, c. 36, all the previous prohibitions contained in some eighteen statutes were repealed, and by the Truck Act, 1831, passed on the same day, which is the Act in question, the whole question was dealt with, and the list of trades in which the practice was prohibited was extended. The previous Acts had contented themselves with a mere prohibition of paying wages otherwise than in current coin or in banknotes. The new Act provided numerous safeguards to avoid evasion to be found in sects. 2-6. The Act is entitled:

> An Act to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm.

It begins as follows:

> Whereas it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm; be it therefore enacted . . . that in all contracts hereafter to be made for the hiring of any artificer in any of the trades herein-after enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise. . . .

Sect. 2 provides that in any contract of the specified employment no provision shall be made directly or indirectly respecting the place where, or the manner in which, the whole or any part of the wages shall be expended. Sect. 3 makes effective the prohibition which in sect. 1 was confined to contracts by providing that the entire amount of the wages earned by, or payable to, any artificer shall be actually paid to such artificer in the current coin of the realm. It thus would prohibit all deductions, but it goes on to say that every payment made to any such artificer of or in respect of wages:

> . . . by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as herein-after mentioned, shall be . . . illegal . . .

The reference to the exception appears to be to sect. 8, which permits payment of wages to be in banknotes if the artificer consents. Sect. 4 gives the artificer the right to recover so much of the wages as have not been paid to him in current coin. Sect. 5 provides that in any action for wages the employer shall not be allowed a set-off or reduction in respect of any goods (*a*) received by the artificer as wages, or (*b*) supplied to the workman at any shop of the employer. Sect. 6 provides that the employer may not maintain any action against any artificer in respect of any goods as mentioned in (*a*) and (*b*) in sect. 5. Sect. 9 imposes a penalty upon any employer who makes a contract or any payment by the Act declared illegal.

So far, the legislature seems to have devised a very thorough system of protection against the evils of truck, one of the chief of which was the habit of unconscionable employers, not only of paying wages in goods, but of requiring wages to be expended in goods bought from the employer at prices which were much above the true value of the goods. It is said, however, that, after constructing this elaborate fortification, the legislature by sect. 23 provides what appear to be easy methods of undermining its foundations. Wages, it is said, could be paid in medicine and medical attendance, fuel, materials and tools for the trade of a miner, provender for the artificer's beast, rent, and victuals prepared or consumed on the employer's premises. It is true that the section provides for deductions to be made from wages in respect of such matters, and in respect of loans made to the artificer for such purposes, and it is clear that, in respect of deductions, the goods and services mentioned cannot have been supplied as wages, for, if already supplied as wages, no deductions are necessary or possible. It has to be conceded that in respect of some of the goods a deduction can only be made of the true value, and, as to any deduction, it cannot be made unless there is an agreement in writing signed by the artificer. Nevertheless, the true construction is that one may pay and contract to pay wages in the goods and services mentioned without any agreement in writing and without any check on value, whereas one may only deduct the value of such goods and services from wages if there is an agreement in writing, and, in some cases, adequate value. My Lords, I cannot accept this construction of the section. I think, with respect, that GODDARD, L.J., went too far in saying that the section applied only to deductions, though there appears to be some support for that view in some of the opinions in *Williams* v. *North's Navigation Collieries* (*1889*), *Ltd.* (1), at pp. 140, 142. I agree, however, that the main purpose of the section was to authorise deductions from wages. For that purpose, it was necessary to make clear that the goods or services in respect of which the deductions might be made might lawfully be supplied, or agreed to be supplied. The terms of sect. 6, and, in particular, the terms of sect. 2 that no provision shall be made directly or indirectly as to the manner in which any part of the wages is to be expended, are quite sufficient, in my opinion, to raise such doubts as would need to be allayed by the terms of the section: " nothing herein contained shall extend or be construed to extend to prevent . . . " When one considers that the expressed object of this Act was to prevent the payment of wages in goods, it would be very remarkable that an exception should be made without any reference at all to the supply of the goods and services specified being by way of wages. When there are added the provisions as to deductions and loans, which are unmeaning unless the supply of goods and services to which they relate is something other than wages themselves, I am forced to the conclusion that the section does not afford the easy passage through the early prohibitions, and that the supply of the goods and services specified in the section cannot be made by way of wages. I should add that, in any circumstances, this case could not be regarded as one of deduction, but that the defendants must succeed, if at all, on their contention that the first part of the section authorised the payment of wages in kind.

On the remaining question of the period of limitation, there has been no difference in the courts below, and the decision seems manifestly right. There is a new cause of action created by sect. 4, which goes only to a limited part of the remuneration. No such cause of action exists apart from the statute, and it follows that the period of limitation must be as decided. The appeal should be allowed, with costs here and in the Court of Appeal, and the judgment of Wrottesley, J., restored.

Lord Thankerton: My Lords, I have had the opportunity of A considering the opinion which has just been delivered by my noble and learned friend Lord Atkin, and I desire to express my concurrence in it. I only wish to add one or two observations.

In my opinion, sect. 23 is dealing with matters external to the hiring contract, which has been dealt with by sects. 1 and 2, but it is to be observed B that sect. 2 not only deals with the hiring contract but also strikes at any other contract between the artificer and his employer which contains provisions which directly or indirectly offend against the section. One of the purposes of sect. 23 is to make it clear that the contracting to supply any of the matters specified in sect. 23 is not to C be affected, but sect. 23 in no sense expresses permission to supersede the hiring contract so as to make it a contract of truck, or barter, for wages. On the other hand, sect. 23 does expressly authorise the employer to make, or contract to make, a stoppage or deduction from the wages due under the hiring contract in respect of the supply of the matters D specified in the section, despite the provisions of sect. 2, provided that he has the signed agreement of the artificer. I agree with the motion proposed by my noble and learned friend Lord Atkin.

Lord Russell of Killowen: My Lords, that this is a difficult E case is apparent from the difference of opinion prevailing both in the courts below and in your Lordships' House, but, after careful and anxious consideration, I concur with the view that the appeal should succeed. As I see it, the case turns wholly upon the true construction to be placed upon the Truck Act, 1831, s. 23. F

The respondents contend that (as regards the trades to which the Act applies) the Act specifically authorises the payment of wages in goods, or otherwise than in cash, to the extent and in manner therein mentioned, and that, accordingly (what is relevant to this case), it authorises an employer to supply, or to contract to supply, to a workman as part of G his wages victuals dressed or prepared under the roof of the employer and there consumed by the workman. On the other hand, the appellant contends that the section only authorises the employer to supply, or to contract to supply, to a workman the matters specified in the section (including such victuals as aforesaid) as something outside his wages H which must be wholly payable in cash, though the section permits a proper deduction from those wages in respect of the matters supplied, provided an agreement for such deduction shall be in writing and signed by the workman. Those are the two rival views, between which we have to choose. For myself, I feel at the outset pressed by the fact

that the Act, by its title and preamble, declares that its object is to effect something which it says is necessary—namely, to prohibit the payment in certain trades of wages in goods, or otherwise than in current coin of the realm—and, it being the avowed object of the Act to effect that necessary reform, it would, in my opinion, require words plain,
A and incapable of any other construction, to justify the view that by sect. 23 the very evil which the Act says it is necessary to prohibit is permitted to continue even to a comparatively limited extent. If, however, as I think it does, the section lies wide open to a different interpretation, I feel bound to give it that interpretation and preserve
B unimpaired the declared intention of the Act.

In my opinion, the section is confined to making it clear that an employer is not prevented from supplying, or contracting to supply, to a workman any of the specified matters (but not on account of wages), and, if he wishes, making a deduction or stoppage in respect of that
C supply from the workman's wages, provided the workman has signed a written agreement for such stoppage or deduction. In other words, it authorises two kinds of transactions which might otherwise have been said to be forbidden by certain provisions of the Act—namely, (i) the supply of goods by sect. 2 (see the words "directly or indirectly"),
D sect. 5 (second part), and sect. 6 (second part), and (ii) the stoppage or deduction by sect. 3. The section presupposes a wage payable wholly in cash, and authorises the supply, or a contract for the supply, of other matters, and, if the workman has signed a written contract authorising it, a deduction or stoppage from the wages in respect of
E what has been supplied. The power to stop or deduct necessarily refers to a stoppage or deduction in respect of the matters which the section permits to be supplied or contracted to be supplied, and, since wages cannot be deducted from wages, it must follow that the matters to be supplied are to be supplied for some value other than the workman's
F labour, and not on account or as part of the wages for that labour. It would indeed be strange if the legislature had authorised a verbal contract for the payment of wages (it might be wholly) in kind, but insisted on a contract in writing before any deduction in respect of kind could be made from cash wages. For these reasons, I think that
G the section does not operate to allow any portion of a workman's wages to be paid or payable otherwise than in cash.

Upon the question of limitation, I agree with the view which is, I believe, shared by all before whom this case has been argued. The appellant is bringing an action which, but for sect. 4 of the Act, he
H could not bring. The action is, therefore, brought on a specialty, and the limitation period is twenty years. I would allow the appeal and restore the judgment of WROTTESLEY, J.

LORD WRIGHT [read by LORD RUSSELL OF KILLOWEN]: My Lords, the facts of the case have already been fully stated, and I need not

repeat them. It is enough to say that, in my opinion, the weekly wages which the respondents contracted to pay to the appellant were 53*s*. in cash and certain meals—namely, dinner and tea—dressed and prepared under the roof of the employers and there consumed, said to be worth 10*s*. The meals were as much the man's wages as was the money payment. This follows from the definition contained in sect. 25. A
The food was something which was had or contracted to be paid as a reward for his labour, and was, equally with the money, to be deemed to be the wages of his labour. His wages were not 63*s*. subject to a deduction of 10*s*. per week, which was the admitted fair value of the meals, but were 53*s*. and the meals. B

Such being the contract, it falls precisely within the mischief aimed at in the Truck Act, 1831, s. 1. The preamble to the section stated that it was necessary in certain trades to prohibit the payment of wages in goods, or otherwise than in the current coin of the realm, and the section enacted that, in all contracts thereinafter to be made for the C
hiring of any artificer in any of the enumerated trades, and for the performance by the artificer of any labour in such trades, his wages should be made payable in the current coin of the realm, and not otherwise. The section went on to declare "illegal, null and void" any such contract in which the whole or any part of such wages should be pay- D
able in any manner other than "in the current coin aforesaid."

The appellant is admittedly an artificer to whom the Act applies. It must, it seems, follow, unless there is in the Act some specific exception to the contrary which takes this contract out of sect. 1, that the contract was illegal, null and void. If that is so, the appellant must E
be entitled to say that he is not bound by the illegal and void contract, but has the right to claim to be paid a fair remuneration for his services, and, after giving credit for any money payments which he has received on account of remuneration, to recover under sect. 4 so much of the wages earned by him as was not actually paid to him by the respondents F
in the current coin of the realm. In effect, if a fair wage was 63*s*. per week, the respondents must deduct from each week the amount of 53*s*. actually paid to him in cash or current coin, and then he is entitled, under sect. 4 of the Act, to claim the balance of 10*s*. per week. This is his actual claim, which, so far as I understand it, it is only attempted G
to meet, apart from questions of limitation, by a contention that the plain effect of sect. 1 is qualified by sect. 23, with the result that, in the circumstances of the case, the contract is not illegal and invalid, but is good and enforceable.

It is true that a statute must be read as a whole, and, when its sections H
are read together, it may turn out that the apparent effect of one section, even of a governing section such as sect. 1 of the Act, may be cut down and qualified by a later section or sections. However, with all respect to the members of the Court of Appeal, who have taken the view that sect. 23 has this effect, I find it impossible so to construe this Act as to

nullify the plain provision of sect. 1, or to find anything which legalises a contract of employment in which wages are payable otherwise than in current coin. The mere fact that sect. 23 enables the employer to supply certain things to the man is not expressly inconsistent with sect. 1, nor is it so inferentially. It says nothing as to how the things supplied are to be paid for. The part of sect. 23 which deals with deductions from wages, which is expressly an exception to sect. 3, seems to me to presuppose that the wages are cash wages and nothing else. The Act was a remedial measure, following a long-established policy of the English legislature to protect workmen against the exaction of avaricious employers who sought to make an extra profit by compelling their men to take their wages in part in goods, or, in some cases, to purchase necessaries at the employers' shops. The evils liable to result are too well known and too obvious to need to be stated here. It is no answer to a claim for breach of the positive prohibition of the Act that, in the particular case, the employer was generous, and was helping his men, or that—as, for instance, in this case—the man would be getting an undue advantage by first accepting the wages in cash and kind and then reopening the transaction by claiming a second payment in cash in respect of what he had already received by way of a reward in kind. Sect. 4 provides for that very state of things. Nor could the statute draw a distinction between good and bad employers. Its terms are, and must be, mandatory and absolute. Hence, it is not right to say that the claim is unconscientious. The appellant is merely claiming what the law gives him. It is the respondents' own fault or misfortune if, no doubt with the best intentions, they did not comply with the law. The plain effect of sect. 1 can only be negatived or qualified by an equally plain exception, whether expressed or by necessary inference. As I hope to explain in detail, I find no such exception in the Act.

The respondents' contention, however, is that they did comply with the law. That depends on what is the true effect of sect. 23. As the statute is remedial and for the benefit of the workman, there is no reason to construe it strictly against him, though it does limit the employers' common law rights. On the contrary, the statute should be, if required—that is, if it is ambiguous—construed in favour of the workman. However, in the view which I take of the position, there is no occasion to dwell on this aspect. The Act is not, to my mind, ambiguous. It is enough to construe the Act according to its ordinary fair interpretation in order to decide this appeal.

Before further considering sect. 23, I should refer shortly to some other sections of the Act. Sect. 2, like sect. 1, deals with the provisions of the contract. A contract coming within the Act is to be illegal, null and void if it contains provisions as to the place where, and the manner in which, the whole or part of the wages are to be expended. Sect. 3 deals, not with the contract, but with payment of the contracted wages.

It requires such wages to be paid in the current coin of the realm, and enacts that any payment made by the employer to the man " of or in respect of any such wages " by the delivering to him of goods, or otherwise than in current coin of the realm, shall be illegal, null and void. Sect. 3, however, unlike sects. 1 and 2, is qualified by the words " except as hereinafter mentioned." The qualification, as the sequel here will show, refers to sects. 8 and 23. Before considering the effect of these sections, I should refer to sects. 5 and 6. Sect. 5 prohibits, in any action brought by a man against his employers for his wages, any set-off or claim to reduce the claim by reason of any goods received by the man " as or on account of his wages or in reward for his labour," or for any goods supplied at a shop or warehouse kept by the employer or in the profits of which he is interested. Sect. 6 contains a prohibition against any action by an employer against the man in respect of goods supplied to the man " as or on account of his wages or reward for his labour," or supplied from a shop or warehouse kept by the employer or in which he is interested. These two sections are ancillary to the first four sections of the Act, and are aimed at excluding any subterfuge by which the provisions of the first four sections might be evaded, as well as expressly dealing with the mischief of what used to be called " the tommy shop " —that is, a shop in whole or in part, in name or in fact, owned or operated in the interest of the employer. It is to be noted that these sections deal with two different and distinguished matters. The former deals with goods and the like supplied as on account of his wages, but does not prohibit the man doing what he likes with his cash wages, such as paying his employer for goods supplied, provided the workman does not get them from a shop or warehouse owned by the employer or in which he is interested. However, there is no prohibition, so far, aimed at preventing the employer from supplying goods or services to his men, so long as they are on cash or other ordinary terms and do not affect the wages, or the payment of the wages, or form part of the wages, and are not supplied for or on account of wages, or at a tommy shop.

The prohibition in sect. 8, which is one of the exceptions referred to in sect. 3, is obviously inserted for reasons of convenience, which are not thought to be inconsistent with the policy of the Act. Banknotes, it enacts, are to be treated as currency, and as equivalent to current coin, just as they are commonly regarded in ordinary life. In fact, they are now legal tender, and have practically ousted gold as currency. The section deals, not only with actual payments, but with contracts for payment, in banknotes, but only, however, if the " artificer shall be truly consenting to receive them."

Sect. 23 is the section on which the majority of the Court of Appeal proceeded, holding that it protected contracts offending against sect. 1 as well as payments offending against sect. 3. In the words of SLESSER, L.J., at p. 361, sect. 23 provides that:

> . . . nothing in the Act shall render illegal a contract to give food of the

> kind defined in sect. 23 in addition to money wages as remuneration for his services . . .

In his view, also [p. 361], the section is:

> . . . an omnibus provision sweeping up sects. 2 and 3 in the permitted exceptions.

Sect. 23 may be analysed into two parts. The latter part deals with stoppages and deductions from wages in respect of the matters—goods, rent, and so forth—enumerated in the first part of the section. This part of sect. 23 is not directly relevant in this appeal, for two reasons. First, there was no stoppage or deduction from a money wage which this part of the section is clearly postulating, on account of goods and so on supplied. The food was part of the wage, and could not be deducted from itself. Secondly, even if there had been a deduction from the cash wage of the fair value of the things supplied, there was no agreement or contract for such stoppage or deduction in writing or signed by the appellant, which is the condition required by the section. This part of the section does *pro tanto*, where it applies, qualify sect. 3, which deals with payment, and constitutes one of the exceptions referred to in sect. 3. The question raised, however, is whether the first part of sect. 23 constitutes, as the majority of the Court of Appeal held, an exception to sect. 1. I cannot, with all respect, think that it does. In the first place, sect. 1 is unqualified in terms. Nor does sect. 23 in terms refer to sect. 1, or purport to qualify it. It is said that inferentially it does, because otherwise it is superfluous. There is nothing, it is said, in the Act which forbids an employer to supply goods and the like as an ordinary creditor, so long as he does not do so as, or on account of, wages. The section, it is said, must have been inserted with some definite object, and that object must at least have been to give a special exception from sect. 1 in respect of the specific categories of goods or other considerations enumerated in the section in respect of which, it may be, the legislature thought that it would or might be beneficial to the man if he were able to get them from the employer as remuneration for his services. I do not regard this as a sound argument. In my opinion, so drastic a qualification of the fundamental provisions of sect. 1, if intended, would have been effected by clearly expressed exceptions and permissions, and not by the mere cautionary words: "nothing . . . shall extend or be construed to prevent . . ." Such words are more apt to introduce matters inserted *ex abundante cautela*, and to resolve possible doubts by clearly stating what may be lawfully done, or to lead up, by enumerating the relevant matters, to the express and definite modifications which the latter part of the section enacts. It is true that in the Act there is nothing to prevent an employer from supplying goods or other benefits to a workman and charging for them, so long as sects. 1 and 3 are not infringed—that is, so long as the contract wages are in current coin, and so long as sects. 2, 5 and 6 are not infringed. The first part of sect. 23 may have been inserted to exclude, in the specific cases mentioned, any question under these latter sections. However that may be, the first part of sect. 23

contains no reference to the wages contract. It does not in terms enable the employer to supply, or contract to supply, the enumerated things or benefits as for, or on account of, wages. It does not say that any part of the wages should be made payable in the form of, or by means of, such things. To my mind, it leaves sect. 1 entirely on one side. The two sections can stand together, without any contrariety or overlapping. Sect. 23 (first part) is silent as to how the goods and the like are to be paid for by the workman. The clear intention is, in my judgment, that the wage contract is to be for payment in current coin, and payment is to be made, accordingly, in current coin subject only to sect. 8, and to sect. 23, where it applies—that is, where a stoppage or deduction is permitted in the special cases—and subject to the special conditions expressed in the section. Save in such cases, and subject to these conditions, sect. 3 is unaffected. Sect. 1 is not affected by sect. 23 at all. In the facts of this case, the latter part of sect. 23 obviously does not apply. That section can only be relevant if it be held that the former part qualifies sect. 1 and validates what is *ex facie* a breach of its clear terms. As I do not think, for the reasons which I have endeavoured to explain, that it expressly or impliedly qualifies sect. 1, I regard it as irrelevant in this appeal, and I agree with Wrottesley, J., and Goddard, L.J. After more than a century, this important question of construction has for the first time come before this House. The House must decide the question simply on a fair reading of the actual words of the Act. I further observe that the construction adopted by the majority of the Court of Appeal would, over a wide and important area, completely nullify sect. 1, which is the governing section of the Act. The Truck Amendment Act, 1887, s. 4, is different in expression and in policy, and, in any case, could not help in determining the construction of the Act of 1831.

On the question of the proper period of limitation of the claim, I agree with what I think has been the opinion of all the judges below, which is that the proper period is twenty years under the Civil Procedure Act, 1833, s. 3, because the debt is a specialty debt due under a statute. The appellant's claim is brought on sect. 4 of the Act of 1831, and on nothing else. As the contract offended against sect. 1, it was illegal, null and void. There was thus no contract under which he could claim any remuneration. He must rely on sect. 4, which contemplates that the man has earned wages, and enables him to receive so much of the wages as he has not been paid in current coin. What, in such a case, are the wages, and how are they to be estimated? They cannot be estimated on the basis of any contract, because there is none. The answer can only be that they are to be assessed on the basis of a fair and reasonable remuneration. In this case, that has been taken to be 63*s.* per week, not because the contract is reinstated in any sense, because that is in law impossible, but because the facts afford good evidence that 63*s.* per week was a reasonable reward. That being so, from the wages earned, sums actually paid in cash must be deducted, and the balance of 10*s.* per week is recoverable by the appellant for the whole period of his claim. I concur in the motion proposed.

LORD ROMER: My Lords, the question to be decided upon this appeal is one of some importance, arising under the Truck Act, 1831. The question is this. Having regard to the provisions of sect. 23 of that Act, is it lawful for an employer to pay, or contract to pay, part of the wages of an artificer within the meaning of the Act by the supply of victuals dressed or prepared under the roof of such employer and there consumed by the artificer? The answer to the question depends upon the proper construction of the section, and, in order to ascertain this, some of the earlier provisions of the Act must be examined.

Sect. 1 of the Act is concerned with the contract of hiring made between the employer and the artificer. In every such contract, the wages of the artificer must be made payable in the current coin of the realm, and not otherwise. If, in any such contract, the whole or any part of such wages are made payable in any manner other than in the current coin of the realm, the section provides that the contract shall be, and is, thereby declared illegal, null and void. This section, however, would not of itself be sufficient to effect the object of the Act, which, as expressed in its title, was:

> An Act to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm.

An unscrupulous employer might well contract to pay the wages of an artificer in such coin, and, nevertheless, on the day of payment, induce the artificer to accept goods in discharge of the contractual sum in whole or in part. It is accordingly provided by the second half of sect. 3 that any payment of wages by delivery of goods, or otherwise than in current coin, shall be illegal. Another way in which such an employer could defeat, not the letter, indeed, but the spirit, of the object as so expressed would be by inducing his employee to purchase goods from him on credit and subsequently deducting the price of such goods from the man's wages. Any such deduction is forbidden by the first half of sect. 3, which provides that the entire amount of the wages earned by, or payable to, the artificer shall be actually paid to him. The object of the Act might have been defeated in yet another way. An employer might by contract with the artificer impose upon the latter the obligation of laying out or expending the wages due or to become due to him upon, or in the purchase of, goods from a shop or warehouse kept by, or belonging to, the employer, or in the profits of which the employer might have a share or interest. The wages, in such a case, would, no doubt, be wholly paid in coin of the realm, but, by virtue of such a contract, they would in whole or in part find their way back into the pockets of the employer. It is therefore provided by sect. 2 of the Act that a contract imposing such an obligation is "illegal, null and void." Sects. 5

and 6 are also designed to prevent, on the part of an employer, evasions of the objects that the Act had in view, and, though some of the provisions contained in them are not, perhaps, strictly necessary, in view of the earlier sections, they do contain other provisions which complete the scheme of the Act by depriving the employer, as between himself and the artificer, of any right of action or set-off in respect of goods A sold or supplied to the artificer at any shop or warehouse kept by or belonging to the employer, or in the profits of which the employer has any share or interest. The important thing to notice about the five sections to which I have referred is that each one is an integral and necessary part of the scheme for carrying into effect the expressed object B of the Act.

I must now turn to sect. 23. Its terms are familiar to your Lordships, and I need not read it at length. It is sufficient for the moment to call attention to the opening words:

> Nothing herein contained shall extend or be construed to extend to prevent . . . C

Notwithstanding these words, it is plain from what follows that the section is not inserted *ad majorem cautelam*, but is really a section which introduces exceptions to the Act. In other words, I agree with the author of the marginal note to the section, who there describes it as D constituting: "Particular exceptions to the generality of the law." The question that your Lordships are called upon to determine upon this appeal is what those exceptions are. In the Court of Appeal, GODDARD, L.J., thought that the exceptions were of a very limited nature, and he said, at p. 366:

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> In my opinion, the section deals with authorised deductions and the circumstances in which they may be made, and with nothing else.

He considered, therefore, in effect, that the section merely creates an exception to the first part of sect. 3, which provides that the entire amount of the wages shall be actually paid in coin of the realm. I do F not so read the section. If that had been its object, it would necessarily, I think, have been expressed in very different language. The section as drawn seems to make a clear distinction between the supply, or the contract to supply, certain things and the demising therein mentioned, on the one hand, and the stoppage, or deduction from wages, on the G other. The stoppage or deduction is treated as a separate and distinct matter. The section provides that nothing in the Act is to prevent an employer from supplying, or contracting to supply, the things mentioned, or demising as therein provided. That is one thing. It goes on as follows:

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> . . . nor from making or contracting to make any stoppage or deduction . . .

That means: " . . . and nothing in this Act is to prevent an employer from making or contracting to make any stoppage or deduction." That is another, and a different, thing. SLESSER, L.J., said that the section deals with two different subject-matters. FINLAY, L.J., said that the section falls into two distinct parts, intended to have a separate and distinct operation. I respectfully agree with them. For those reasons, the section, so far as it is relevant to the present appeal, may be read as follows: "Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer and there consumed by such artificer." This, taken by itself, is sheer nonsense. Nothing in the rest of the Act is capable, even by the most perverse construction, of being treated as prohibiting an employer from supplying, or contracting to supply, his workmen with food, wherever dressed or prepared, or wherever it may be eaten. What the Act does prevent is the attaching by the employer of certain conditions to any such supply, or contract to supply. He may not, at the time of hiring, attach a condition that the food shall be taken as part of the artificer's wages (sect. 1). He may not stipulate that the artificer shall lay out his wages in buying the food from the employer, whether on or off the employer's premises (sect. 2). The employer may not pay the wages, either in whole or in part, by supplying him with the food (second part of sect. 3). If the employer supplies the artificer on credit with the food from his own shop, or from any shop in the profits of which the employer has a share or interest, he cannot recover the price by action, or set it off in any action brought by the artificer for the recovery of his wages (sects. 5 and 6). If, therefore, the first part of sect. 23 is to have any operation at all—and it is plain that some effect must be given to it if possible—this can only be done if it be treated as introducing an exception to one or more of the sections to which I have just been referring. This much is, indeed, conceded by the appellant, if the section is not to be regarded as dealing solely with deductions from wages. He contends, however, that the only sections of the Act to which sect. 23 is, in that event, to be regarded as introducing an exception are sect. 2 and (presumably) sects. 5 and 6. He maintains that there are no exceptions to sect. 1 or to the second part of sect. 3.

My Lords, with the greatest respect to those who think differently, I find it impossible to understand why, if the first part of sect. 23 is to be treated as introducing an exception to sects. 2, 5 and 6, it is not to be treated as having the like effect on sect. 1 and the second half of sect. 3. It has been objected that so to treat it is inconsistent with the expressed object of the Act, which, as I have already stated, is to prohibit payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm. However, in the first place, I know of no rule of construction which would deny to a section of an Act an excepting effect because to do so would limit the expressed object of the Act. That is the function of an exception. The exceptions which I find contained in sect. 23 are, in any case, very limited in their scope, and, even if they extend to sect. 1 and to the second half of sect. 3, as I think they do, it is still quite accurate to describe the Act as one to prohibit the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm. In the second place, each of the sects. 1, 2, 3, 5 and 6 is, as I have already pointed out, an essential and integral part of the scheme for effecting the object of the Act, and, if it be inconsistent with the expressed object of the Act to treat the first part of sect. 23 as introducing exceptions to the provisions of sect. 1 and the second part of sect. 3, it is also inconsistent with that object to treat sect. 23 as introducing exceptions to sect. 2 and the first part of sect. 3. That the second part of sect. 23 does introduce an exception to the first part of sect. 3, which prohibits deductions from the wages, is admitted by everybody, but a deduction from wages results in a part of them, not only not being paid in the current coin of the realm, but not being paid at all, and that is even more inconsistent with the expressed object of the Act.

A further criticism of the construction which I place upon sect. 23 is that the section throughout assumes that the wages are contracted to be paid in current coin of the realm. If part of the wages contracted to be paid consists of food, so runs the argument, the second part of sect. 23 can have no operation. Wage cannot be deducted from wage. With all respect, I am unable to regard this as a legitimate criticism. The second part of the section is, no doubt, dealing exclusively with cases where the contractual wage consists wholly of coin of the realm, or the substitutes for such coin permitted by sect. 8, but that is no reason for confining the exceptions introduced by the first part of the section to such cases. The word " wages " is not to be found in that part of the section, from beginning to end. I would also, in this connection, call attention to the fact that in sect. 25 of the Act it is provided that, within the meaning and for the purposes of the Act, any money " or other thing " had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done shall be deemed and taken to be the wages of such labour. These words seem to contemplate that in some cases a thing other than money may properly form part of the wages of an artificer. This, however, can never be the case unless sect. 23 bears the construction which I put upon it.

I have not lost sight of the fact that the stoppages or deductions permitted by the second part of sect. 23 can only be made when there is an agreement or contract in that behalf in writing signed by the artificer, whereas no such contract or agreement would be requisite in the case of any exception to the provisions of sects. 1 and 2 and the second part of sect. 3. This may be an argument in favour of treating sect. 23 as merely permitting certain deductions from wages. It is no argument in favour of treating it as providing an exception to sect. 2 and not an exception to sect. 1 and the second half of sect. 3. In my opinion, sect. 23 creates certain exceptions of a very limited character to the scheme, and to every part of the scheme, devised by the Act for ensuring that a workman shall not directly or indirectly be paid his wages except in coin of the realm, or its permissible equivalent. The scheme is to be found in sects. 1, 2, 3, 5 and 6, and I can find no good or sufficient reason for excluding from the operation of sect. 23 any single one of these integral parts of the scheme. This was the view of the section taken by SLESSER and FINLAY, L.JJ., and I agree with them. I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors: *Corbin, Greener & Cook* (for the appellant); *J. N. Mason & Co.* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

LISSENDEN *v.* C. A. V. BOSCH, LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Romer), **December 7, 1939, February 8, 1940.**]

Workmen's Compensation—Award of arrears of compensation but terminating weekly payments—Appeal against termination of weekly payments—Arrears and costs of arbitration accepted by workman's solicitors—Approbation and reprobation—Workmen's Compensation Act, 1925 (*c.* 84), *Sched. I* (4)—*R.S.C., Ord.* 58, *rr.* 4, 20 (*d*).

An award of workmen's compensation at the rate of 12*s.* 3*d.* per week was made in favour of a workman under the Act of 1925 in respect of his incapacity caused by industrial disease for the period from Oct. 5, 1936, until the date of the hearing—namely, Oct. 31, 1938—together with the costs of the arbitration. The workman received, and signed a receipt for, the arrears of compensation due under the award, and the taxed costs were paid to his solicitors. The workman thereafter appealed from the award in so far as it terminated the weekly payments of compensation on Oct. 31, 1938, on the ground that he had not wholly recovered from the effects of the industrial disease:—

HELD: in accepting the arrears of compensation, the workman was exercising a legal right to be paid what was admittedly due to him, and, in serving his notice of appeal, he was exercising another and independent legal right of claiming the further relief to which he maintained he was entitled. The case, therefore, was not one of election, and the workman had a right of appeal.

Johnson v. *Newton Fire Extinguisher Co., Ltd.* (1) *overruled.*

EDITORIAL NOTE. In the opinions given herein there is a careful and full consideration of the phrase "approbation and reprobation," more commonly known to English lawyers as "blowing hot and cold." It is obscure whether this is a doctrine or principle of English law. If it is rightly so called, it has certainly been adopted from Scots law. It is probable that the better view is that the authorities which refer to the phrase are particular examples of the doctrines of waiver, election or estoppel. Although the phrase is discussed with reference to a number of authorities dealing with a variety of subjects, it will probably be the wiser course to treat the decision as confined to the case of an appeal from an award of an arbitrator under the Workmen's Compensation Act. It is stated, however, that in general a litigant may appeal from part of a judgment, and in this respect judgments and awards are not entire and indivisible, but the point is reserved whether or not there are certain cases of a statutory right of appeal where the right of appeal may be lost by taking the benefit of the judgment.

As to Appeal against Part of an Award, see DIGEST, Vol. 34, pp. 479, 480, Nos. 3947-3954; and see WILLIS'S WORKMEN'S COMPENSATION, 32nd. Edn., pp. 671-673.]

Cases referred to:

(1) *Johnson* v. *Newton Fire Extinguisher Co., Ltd.*, [1913] 2 K.B. 111; 34 Digest 479, *3947*; 82 L.J.K.B. 541; 108 L.T. 360; 6 B.W.C.C. 202.

(2) *Malcolm* v. *Barber, Walker & Co., Ltd.* (1927), 137 L.T. 470; Digest Supp.; 20 B.W.C.C. 516.

(3) *Reeves* v. *Smith (S.) & Sons* (1922), 15 B.W.C.C. 190; 34 Digest 480, *3954*.

(4) *Jones* v. *Smith*, [1936] 1 All E.R. 661; Digest Supp.; 29 B.W.C.C. 75.

(5) *Ker* v. *Wauchope* (1819), 1 Bli. 1; 20 Digest 405, *1429*.

(6) *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef. 444; 38 Digest 681, case *qqq*.

(7) *Codrington* v. *Codrington* (1875), L. R. 7 H.L. 854; 20 Digest 406, *1433*; 45 L.J.Ch. 660; 34 L.T. 221; *affg.* S.C. *sub nom. Codrington* v. *Lindsay* (1873), 8 Ch. App. 578.

(8) *Lacy* v. *Anderson* (1582), Ch. Cas. in Ch. 155; 13 Digest 123, *1540*.

(9) *Dillon* v. *Parker* (1833), 7 Bli. N.S. 325; 20 Digest 443, *1684*; *affg.* (1822), Jac. 505.

(10) *Re Vardon's Trusts* (1885), 31 Ch.D. 275; 20 Digest 407, *1435*; 55 L.J.Ch. 259; 53 L.T. 895.

(11) *King* v. *Simmonds* (1848), 1 H.L. Cas. 754; 4 Digest 22, *154*; *affg.* (1845), 7 Q.B. 289.

(12) *Tinkler* v. *Hilder* (1849), 4 Exch. 187; 16 Digest 123, *218*; 18 L.J. Ex. 429; 13 L.T.O.S. 238.

(13) *Kennard* v. *Harris* (1824), 2 B. & C. 801; 2 Digest 553, *1845*.

(14) *Pearce* v. *Chaplin* (1846), 9 Q.B. 802; 21 Digest 328, *1231*; 16 L.J.Q.B. 49; 8 L.T.O.S. 161.

(15) *Mills* v. *Duckworth*, [1938] 1 All E.R. 318; Digest Supp.

(16) *Cunard S.S. Co., Ltd.* v. *Moore* (1935), 104 L.J.K.B. 467; Digest Supp.; *sub nom. Moore* v. *Cunard S.S. Co.*, 153 L.T. 51; 28 B.W.C.C. 162.

(17) *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; 34 Digest 225, *1884*; 57 L.J.Q.B. 7; *on appeal* (1888), 4 T.L.R. 561.

Appeal from an order of the Court of Appeal (Slesser, Clauson and Goddard, L.JJ.), dated Dec. 7, 1938, affirming an award under the Workmen's Compensation Acts by His Honour Judge Drucquer, dated Oct. 31, 1938, at the Brentford County Court, dismissing the present appellant's appeal with costs. The facts and the arguments are fully set out in the opinions of their Lordships.

D. N. Pritt, K.C., and *Donald McIntyre* for the appellant.

F. A. Sellers, K.C., and *Martin Jukes* for the respondents.

Viscount Maugham [read by Lord Romer]: My Lords, this is an appeal from the Court of Appeal affirming an award under the Workmen's Compensation Act, 1925, made by His Honour Judge Drucquer at the Brentford County Court. By the award, it was ordered that an award be entered for the appellant against the respondents for the sum of £66 3*s.*, being compensation at the rate of 12*s.* 3*d.* per week as for partial incapacity from Oct. 5, 1936, until Oct. 31, 1938, with costs. The appellant appealed to the Court of Appeal against the award, asking that the award be set aside or varied so that the weekly sum of 12*s.* 3*d.*, being compensation as for partial incapacity, should continue after Oct. 31, 1938, so long as the appellant should be incapacitated, or, in the alternative, that a new trial be had between A the parties. The appeal came before the Court of Appeal, consisting of SLESSER, CLAUSON and GODDARD, L.JJ., on Dec. 7, 1938, and, upon the hearing of the appeal, a preliminary objection was taken by counsel for the present respondents, based on the contention that the appellant could not be heard to prosecute the appeal, as he had accepted the B compensation and the costs awarded by the terms of the award, and had thereby approbated the award.

The grounds on which it was contended that the appellant had approbated the award are these. On Nov. 14, 1938, the respondents' solicitors sent to the appellant's solicitors a cheque for £66 3*s.*, being C the amount of compensation payable under the award. On Nov. 17, 1938, the respondents' solicitors sent to the appellant's solicitors a cheque for the amount of the appellant's costs in the arbitration as taxed. On Nov. 21, 1938, the respondents' solicitors received, with a letter dated Nov. 19, 1938, from the appellant's solicitors, a receipt D signed by the appellant for the sum of £66 3*s.* compensation. On Nov. 23, 1938, the respondents' solicitors received an acknowledgment of the sum of £26 8*s.* 8*d.* paid in respect of the costs of the arbitration. These facts are not in dispute. The notice of appeal to the Court of Appeal bore the same date as the date last mentioned—namely, Nov. 23, E 1938—and it was limited as above stated. That is to say, it did not seek to alter or disturb the award of compensation up to Oct. 31, 1938, but sought to have the period of compensation for partial incapacity extended, or, alternatively, to have a new trial.

The preliminary point is, in effect, a plea as to jurisdiction. The F Court of Appeal held themselves bound by certain previous decisions of the court to allow the plea and to dismiss the appeal, with the result that the award stands. The leading case is *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1), which has frequently been followed, till recently without comment or criticism. The court consisted of SIR H. H. G COZENS-HARDY, M.R., and BUCKLEY and HAMILTON, L.JJ. The award was for weekly compensation, but it ordered certain instalments of costs to be deducted from these sums. The court held that workmen who had received certain sums under the award could not appeal against any part of it. The ground stated had at least the merit of simplicity. H The award, it was said, was indivisible. The appellant had accepted and acted upon it by a receipt of compensation. He could not accept part of it and claim to amend another part. That would be an attempt to approbate and reprobate the award, which could not be allowed.

My Lords, the question is whether this proposition is a sound one. I do not propose to mention all the reported cases in which it has been followed, but I may observe that it was doubted by Sargant, L.J., in *Malcolm* v. *Barber, Walker & Co., Ltd.* (2), and that in the present case all three Lords Justices commented upon the injustice to which the proposition by which they were bound had led. The rule has been held to apply irrespective of intention and of hardship. Thus, in *Reeves* v. *Smith* (*S.*) *& Sons* (3), there was an award on the basis of partial incapacity on Apr. 18, 1922. Pending the drawing up of the award, the employers sent to the workman a cheque for 5 weeks' compensation, in accordance with the award, and said that they would in future send him a cheque every 4 weeks. He accepted the cheque, and shortly after a notice of appeal was served, on the ground of the alleged insufficiency of the award. His solicitor then sent a cheque of his own for the amount of the cheque which had been received by the workman. It was held (by Lord Sterndale, M.R., Scrutton and Younger, L.JJ.) that, on the decided cases, it was clear that the acceptance of the cheque by the workman, even if it were returned, precluded the appeal. In *Jones* v. *Smith* (4), it was held by the Court of Appeal that receipt of a cheque in payment of costs awarded was an approbation, and precluded an appeal. Greene, L.J., held, moreover, following the principle laid down by the authorities, that merely to proceed to taxation of costs under the award was an act of approbation which precluded an appeal.

My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that one may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries, 7th Edn., Vol. I, pp. 141, 142, and he treats "the Scottish doctrine of approbate and reprobate" as "approaching nearly to that of election in English jurisprudence." It is, I think, now settled by decisions in this House that there is no difference at all between the two doctrines. I will cite three cases. First is *Ker* v. *Wauchope* (5), where Lord Eldon, L.C., explained the doctrine in these terms, at pp. 21, 22:

> It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument . . . The court will not permit him to take that which cannot be his, but by virtue of the disposition of the will . . . and at the same time refuse to effectuate the implied condition contained in the will of the testator.

The next case is *Birmingham* v. *Kirwan* (6), where Lord Redesdale treats the two doctrines as the same. He said, at p. 449:

> The general rule is, that a person cannot accept and reject the same instrument: and this is the foundation of the law of election. . . .

The third case is *Codrington* v. *Codrington* (7), where Lord Chelmsford observed, at p. 866:

> It seemed to be considered in argument that the rule of the Scotch law that a person cannot approbate and reprobate under the same instrument was not altogether the same as the English doctrine of election, but Lord Redesdale in *Birmingham* v. *Kirwan* (6) puts them exactly on the same footing.

With this opinion Lord Hatherley agreed, and said that he was himself about to cite the observations made by LORD REDESDALE in *Birmingham* v. *Kirwan* (6) which had just been made by LORD CHELMSFORD. LORD CAIRNS, L.C., stated the matter thus, at p. 861:

> A By the well-settled doctrine which is termed in the Scotch law the doctrine of "approbate" and "reprobate," and in our courts more commonly the doctrine of "election," where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.

In the light of these authorities, it seems that the phrase "One may not approbate and reprobate," or the Latin *quod approbo non reprobo*, B as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law, which finds its place in our records as early as the reign of Queen Elizabeth: *Lacy* v. *Anderson* (8), and see, as regards the history of the doctrine, the very learned note of Mr. Swanston to *Dillon* v. *Parker* (9).

C It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether, in a case of wrongful conversion, D he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles which apply to them, and the effect of the election are all very different from those which prevail where the equitable principle is in question. E I will not attempt to summarise all the rules which are applicable to election in equity, but it is desirable for my present purpose to state some general propositions, which are not, I believe, in doubt. In the first place, till *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1), the doctrine seems to have been confined, in England as in Scotland, to F cases arising under wills and deeds, and other instruments *inter vivos*. In the second place, the doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will, and of the author or donor in the case of instruments—namely, the intention that a man shall not claim under the will or instrument and also claim adversely to G it. The intention, it may be added, is not presumed in the case of two clauses in the same will, and in such a case the doctrine does not apply. Nor could the doctrine be applied in the case of a married woman where either of the properties between which she would *prima facie* have to elect was subject to a restraint on anticipation, for the im-H position of the restraint showed an intention that the married woman should not be put to her election: *Re Vardon's Trusts* (10), at p. 279. In the third place, the doctrine proceeds upon the principle, not of forfeiture, but of compensation. The beneficiary electing against an instrument is required to do no more than to compensate the disappointed beneficiaries. The balance of the property coming to him under the instrument he may keep for himself. In the fourth place, no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election, in other words, being an equitable doctrine, is a question of intention, based on knowledge.

My Lords, I am quite unable to see how this doctrine can be made to apply to the rights of a litigant to appeal either from a judgment or from an award of a county court judge made under the Workmen's Compensation Act, 1925. For the present purpose, there is no difference between the two. Both are the result of judicial proceedings. The Arbitration Act does not apply to arbitrations under the the Workmen's Compensation Act. The powers of a county court judge in such a case are practically the same as those in an ordinary action in the county court, though he remains an arbitrator, and, having made his award, is *functus officio.* The position as to enforcing the award and the position as to appealing on points of law from it are in substance the same as that which obtains in the case of High Court judgments : see the Workmen's Compensation Rules, 1926, rr. 82, 86, and, as to appealing, see R.S.C., Ord. 58, r. 20.

Whether we are dealing with a judgment or an award by a county court judge under the Workmen's Compensation Act, it is, I think, clear (i) that there is no one in the position of a testator or donor, and (ii) that the tribunal cannot be supposed to be intentionally putting the successful litigant to his election between two rights, since his right of appeal is his by statute and rule, and does not depend on the bounty of the judge. Moreover, if *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1) was rightly decided, the would-be appellant's right is forfeited, and he is not allowed to make compensation. Further, his alleged " approbation " would appear to have been an act done without the least intention of giving up his right of appeal. In truth, a judgment, or such an award as that which we are now considering, in no way resembles a will, an instrument *inter partes*, or a deed poll. The tribunal is deciding rights, and has no option but to adjudge or award to a litigant that to which he is entitled, and cannot be supposed to be imposing limits on the powers of the appellate tribunal.

My Lords, I feel bound to come to the conclusion that the decision of the Court of Appeal in *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1) and all the cases in which the courts have felt bound to follow that decision are erroneous, for I think the doctrine which the Court of Appeal invoked was quite inapplicable to the case with which they had to deal. It is necessary to add that there may well be cases in which a litigant may lose his right of appeal by reason of his conduct after the judgment or award, but this result would not, in my view, depend on " approbating and reprobating," but on whether the intending appellant is by his conduct estopped from appealing, or has in equity or at law released his right of appeal. It must be remembered in this connection that an appeal from an award or a judgment does not operate as a stay of execution as to either damages or costs unless the court appealed from or the Court of Appeal so orders (R.S.C., Ord. 58, rr. 16, 20 (*c*), (*d*), and R.S.C., Ord. 59, rr. 14, 16), and it would, therefore, seem very difficult to contend that payment by the defendant of a sum for which the judgment has found him liable can prevent the plaintiff from proceeding with his appeal. If payment of that sum is demanded, execution would not in general be stayed pending the appeal unless evidence were given to show that the plaintiff would probably be unable to repay the amount levied by the execution if, as the result of the appeal, the sum turned out not to be due. If it were shown that the amount of the judgment recovered was no more than the respondent or his counsel had admitted to be due from him, there could be no possible ground for a stay of execution. Conditions are not infrequently imposed when a stay is granted, but I think that the numerous cases reported in the books will be searched in vain for any suggestion that payment by a defendant of what has been found to be due from him operates without more to prevent the plaintiff from appealing for some further relief.

It may be true that an award under the Workmen's Compensation Act, 1925, is " indivisible " if not appealed from, but it is not an accurate statement of the position pending appeal. The rules make it plain that an appellant may appeal from any part of the award, and that his notice of motion must state whether the whole or part only of the award is complained of: R.S.C., Ord. 58A, and R.S.C., Ord. 59, r. 10. That was the course taken by the appellant in the present case. The award was sought to be varied only so far as regards payment of the weekly sum after Oct. 31, 1938. On what ground of law or equity (apart from that suggested in *Johnson's* case (1)) the launching of an appeal so limited ought to make it wrong for the appellant to receive from the respondents the sum awarded up to Oct. 31, and the costs, I am unable to understand, and counsel for the respondents were unable to enlighten us. It certainly cannot be suggested that the receipt of the sum tendered in any way injured the respondents. Neither estoppel nor release in the ordinary sense was suggested. Nothing was less served than the principles either of equity or of justice. My Lords, for these reasons, I am of opinion that this appeal should be allowed, with costs here and in the Court of Appeal, so far as they are applicable to pauper appeals, and that the case should be remitted to the Court of Appeal to be heard and decided.

LORD ATKIN: My Lords, in this case, the applicant admittedly has suffered from an industrial disease—namely, dermatitis—and has been incapacitated from Aug. 16, 1936, either wholly or partially until Oct. 8, 1938. During the short period of total incapacity from Aug. 16, 1936, to Oct. 5, 1936, he was paid full compensation by his employers, the respondents, by whom he was employed as an electro-plater. After that date, the employers employed him in another job at lower wages. On Aug. 10, 1938, he claimed compensation as for partial incapacity from Oct. 5, 1936, onwards. The employers by their answer admitted liability to pay 11*s.* 3*d.* per week from Oct. 5, 1936, to Oct. 8, 1938, at which date, they alleged, their liability ceased. The judge awarded the applicant compensation at 12*s.* 3*d.* per week, from Oct. 5, 1936, to Oct. 31, 1938, the date of his award, but found that the incapacity had ceased at that date. The sum so awarded was £66 3*s.*, of which sum the employers had admitted they were liable to pay £58 18*s.* The judge further awarded to the applicant the costs of the application, which were taxed at £26 8*s.* 8*d.* These two sums the employers' solicitors paid to the applicant's solicitors by cheque on Nov. 14, 1938, and Nov. 17, 1938, receiving in return a receipt signed by the applicant, enclosed in a letter from the applicant's solicitors intimating their intention to appeal. On Nov. 23, 1938, the applicant's solicitors gave notice of appeal, asking that the award should be set aside or varied so that the weekly sum should continue so long as the applicant was incapacitated, on the ground that the judge was wrong in law in holding that the applicant had recovered from the industrial disease on Oct. 31, 1938. When the case came before the Court of Appeal, objection was taken by the respondents that the applicant had lost his right of appeal by accepting payment of the £66 3*s.* compensation and the £26 8*s.* 8*d.* costs awarded by the county court judge. My Lords, I am shocked to say that the Court of Appeal felt constrained to accede to this contention, being bound by *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1), and a series of cases which followed that case, which undoubtedly laid down the law as contended for by the respondents. SLESSER, CLAUSON and GODDARD, L.JJ., pointed out the serious injustice which was done to workmen in such circumstances by such a rule, following in that respect similar remonstrances which had fallen in the more recent cases from other members of the Court of Appeal. That a workman who has been held to be entitled to some compensation withheld from him in the past should not be entitled to exercise his statutory right to appeal so as to ask for more without forgoing the receipt of the compensation admittedly and undoubtedly due until his appeal is heard would, I think, appear to most people a rule unjust and entirely opposed to the scheme of the Act. I have no hesitation in saying that both the original decision and those that followed it are wrong, and should be overruled. In *Johnson's* case (1), there had been no dispute as to the liability to pay compensation, but there was a dispute as to amount, and the workman commenced arbitration proceedings. He claimed 15*s.* per week, and in the proceedings the employers gave notice submitting to an award of 12*s.* 8*d.* The judge held that this was enough, awarded 12*s.* 8*d.*, gave the applicant the costs up to the employers' submission and gave the employers the costs after that date, and ordered that there should be a set-off of costs and that any balance due to the employers, up to £5 5*s.*, should be set off against the compensation payable. The applicant accepted, and received the compensation of 12*s.* 8*d.* per week, but appealed against the order as to costs. The grounds of the appeal were (i) that the judge had no jurisdiction to order, or, alternatively, was wrong in ordering, the applicant to pay the employers' costs, and (ii) that the judge had no jurisdiction to order, or, alternatively, was wrong in ordering, the balance of costs to be set off against the weekly payments of compensation. At the hearing of the appeal, the applicant's counsel withdrew the grounds of appeal affecting the order on the applicant to pay costs, and sought to confine the appeal to the question of set-off of costs against compensation. Nevertheless, the court held that, inasmuch as the workman had received the compensation awarded, he could not further appeal. He was attempting "to approbate and reprobate" the judgment of the county court judge. The award was one and indivisible and it was impossible to allow him to say that part of it was good and part of it was bad.

My Lords, I find it difficult to speak of this judgment with the respect which is due to the eminent lawyers who composed the court. The underlying fallacy is that it appears to treat an "award" made under the Workmen's Compensation Act as identical, for purposes of appeal, with an award of an arbitrator under an ordinary arbitration. It in no way resembles such an award, and it in every way resembles an ordinary judgment. By sect. 21 of the Act, disputes are to be settled by a judge of a county court in accordance with Sched. I of the Act. By Sched. I, cl. 4, the Arbitration Act, 1889, is not to apply, and the decision of the county court judge is to be final unless, within the time and in accordance with the conditions prescribed by the Rules of the Supreme Court, either party appeals to the Court of Appeal. By the Workmen's Compensation Rules, 1926, r. 29, the procedure in an arbitration shall be the same as the procedure in an action commenced in the county court by plaint and summons in the ordinary way, and by r. 30 the award of the judge shall be enforceable in the same manner as a judgment or order of the court. Rule 100 provides that the forms in the appendix may be used where applicable. The Rules of the Supreme Court dealing with appeals are to be found in R.S.C., Ord. 58, r. 20, which, after prescribing certain procedure, provides as follows:

> . . . (*d.*) Subject to the foregoing provisions, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals to which this rule applies:

One of the rules so applied is R.S.C., Ord. 58, r. 4, which, *inter alia*, provides as follows:

> The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied . . .

All those rules, in substantially the same form, were in force in 1913.

They seem to me to establish that the award of the county court judge is, for practical purposes, the equivalent of a judgment, and is no more one and indivisible than is a judgment. If the Court of Appeal can say that part is good and that part is bad, why cannot an appellant ask them to say so ? And, if he can, what difference can it make that he has accepted that which is good ? The fact is that awards in these cases may, and often do, contain on the face of them adjudications on many matters —for instance, that the applicant suffered injury from accident arising out of and in the course of his employment, that he was totally incapacitated from a given day to another given day and that the compensation for that period should be so much, that the total incapacity ceased on the given day and from that day he was partially incapacitated until another day, or that it has not ceased, and that the proper compensation is so much. Nearly all these findings are findings of fact, and, in that case, are not appealable. Any of these, however, may involve questions of law, and so may be appealable. It would reduce the whole system to chaos if the principle that there was one entire award, which must be assailed as a whole or not at all, were really acted upon. If one were to scrutinise the forms, it would be found that form 24, dealing with application by dependants, divides the award into nine heads, in which one declares who are the dependants, another declares that a particular respondent is not a dependant, and another orders the appointed sum to be apportioned in named proportions. It would be quite impossible to apply the Act and the right to appeal if the order were not treated as divisible. It is unnecessary to emphasise the essential differences between an " award " made in these conditions and an award in an ordinary arbitration. In the latter, there is no appeal. The only right is to set aside the award—for instance, for misconduct of the arbitrator, or error in law on the face of the award, or defects in not awarding in full, or in awarding in excess of the submission. In these cases , the whole award goes. There is no power in any court to affirm part and disaffirm part. In these circumstances, it may be right to say that, if a party takes a benefit under an award, he cannot afterwards be heard to say that it was entirely invalid, for, if so, he would have had no right to the benefit he took. I do not propose to decide what the law is in such a case. It may be that even then the question is merely one of restitution. I am quite clear, however, that such a case has no kind of analogy to the present class of case. For these reasons, I am of opinion that the foundation of the reasoning in *Johnson's* case (1)—namely, that the award is an entire award—had no existence, and the decision and all the subsequent decisions decided upon it fall.

In support of the contention that a party cannot appeal from a judgment after he has taken any benefit under it, the respondents relied on two practice cases decided in 1845 and 1849 respectively, which, in view of the importance of this case, I propose to discuss.

King v. *Simmonds* (11) was a case which went to the Exchequer Chamber on a writ of error. When the case first came before the Exchequer Chamber, it was found that, while the writ alleged error on a judgment in a plaint in an action on promises, the transcript of the record showed that the judgment complained of was in fact given A on an issue in execution proceedings. The Court of Exchequer Chamber then suggested that application should be made by the plaintiffs (the defendants in error) to the Court of King's Bench, from whom error was brought, to amend the issue and record. The application was made to WIGHTMAN, J., who gave leave to amend and directed that the B plaintiffs should pay the costs of the amendments. The defendant taxed his costs, which were paid on Jan. 16. On Jan. 14, the defendant obtained a rule to show cause why the order giving leave to amend should not be rescinded. The ground was that the only power to amend under the statutes then applicable—namely, 14 Ed. III, c. 6, and 9 Hen. V, C c. 4, was for misprision of a clerk, which in this case was not suggested. It was obviously an objection to the jurisdiction, and the court held that, having taken a benefit, the defendants could not attack the order. I should suppose that the court would be relieved to find a ground for not deciding the question whether the Court of Exchequer Chamber D had directed an application to be made when there was no jurisdiction to hear it.

In *Tinkler* v. *Hilder* (12), the plaintiff had brought an action for trespass against a county court bailiff for seizing goods on an execution issued under a county court judgment against one Clarke, her landlord. E While the plaintiff's action was pending, the bailiff served the plaintiff with an interpleader summons in the county court, as he was entitled to do. Meanwhile, he allowed the plaintiff to obtain an interlocutory judgment for want of plea. When the interpleader summons was heard, the plaintiff objected that the interpleader summons was too late. F The judge repelled this objection, and, as the plaintiff had filed no particulars in the interpleader proceedings, gave judgment for the execution creditor. The defendant, the bailiff, took out a summons to stay proceedings in the plaintiff's action on account of the interpleader proceedings. This was dismissed by PATTESON, J. A writ of G inquiry was then issued, and the jury assessed the damages at £35. The defendant then took out a summons before PARKE, B., to set aside the judgment and all proceedings thereon, on the ground of the adjudication in the interpleader proceedings. PARKE, B., made the order on payment of the costs of the day and of the execution of the H writ of inquiry. These costs were taxed and paid. The plaintiff obtained a rule *nisi* to rescind this order. It seems to be plain that the ground was that the statute 9 & 10 Vic., c. 95, s. 18, which gave the power to stay, had no application to an action based on trespass to land. In other words, the contention was that the order was made without jurisdiction. The court thought that the fact that the plaintiff had received costs under the order precluded her from taking further objection, and discharged the rule. The short ground was expressed thus by Parke, B., in argument, at p. 190:

> You have, therefore, received a benefit under the order, and cannot now say it is valid for one purpose and invalid for another.

In the course of the argument, counsel for the defendant cited *King* v. *Simmonds* (11), *Kennard* v. *Harris* (13) and *Pearce* v. *Chaplin* (14). *Kennard* v. *Harris* (13) was the case of an award of an arbitrator. A rule to set it aside was discharged when it was shown that the plaintiff had accepted the costs of the reference and award. This case needs no comment. In *Pearce* v. *Chaplin* (14), a judgment had been signed in default of plea, and the defendant applied to set aside the judgment and execution on the ground of an irregularity, it being alleged that, before the judgment was signed, the defendant's solicitor had duly served a summons for time. On the summons, Pollock, C.B., made the order, but made a condition that no action should be brought (presumably against the sheriff). The sheriff, when served with the order, had relinquished the defendant's goods. On a rule to show cause why the order as to no action should not be rescinded, the Court of King's Bench took the view that Pollock, C.B., had not purported to decide the question of irregularity, but had imposed the term acting under his discretionary power, and that, in those circumstances, a party who had taken advantage of the conditional order could not be allowed to discharge the condition. These four cases will be found cited in Chitty's Archbold on Pleadings, 12th Edn., as matters of practice. They are not cited at all in The Annual Practice. In any case, they form a very flimsy foundation for such a wide-reaching principle, applicable to all appeals, as was asserted in this case, and, if they did lead to that result, should not be followed.

However, I also share the difficulty which I think all your Lordships feel as to the application of what has been called the doctrine of "approbation and reprobation." Viscount Maugham has, to my mind, clearly shown the limitations of that doctrine as defined in the law of Scotland, from which it comes. In this country, I do not think it expresses any formal legal concept. I regard it as a descriptive phrase equivalent to "blowing hot and cold." I find great difficulty in placing such phrases in any legal category, though they may be applied correctly in defining what is meant by election, whether at common law or in equity. In cases where the doctrine does apply, the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law.

The doctrine of election could have no place in the present case.

The applicant is not faced with alternative rights. It is the same right which he claims, but in larger degree. In *Mills* v. *Duckworth* (15), a plaintiff who had been awarded damages for negligence had taken the judgment sum out of a larger sum paid into court and had then appealed against the quantum of damages, and was met by a similar objection to his appeal. Greer, L.J., in overruling the objection, pointedly said, at p. 321 :

> He [the plaintiff] said : " I am not going to blow hot and cold. I am going to blow hotter."

Here the applicant is not faced with a choice between alternative rights. He had exercised an undisputed right to compensation, and claims to have a right to more. One has not lost one's right to a second helping because one has taken the first.

It may be the case that the receipt of a remedy under a judgment may be made in such circumstances as to preclude an appeal. I do not think it necessary to discuss in what circumstances the statutory right of appeal may be lost. I only venture to say that, when such cases have to be considered, it may be found difficult to apply this doctrine of election to cases where the only right in existence is that determined by the judgment, and the only conflicting right is the statutory right to seek to set aside or amend that judgment, and that the true solution may be found in the words of Lord Blanesburgh in *Cunard S.S. Co., Ltd.* v. *Moore* (16), at p. 471 :

> It constantly happens that orders appealed against to this House and set aside have been acted upon in the meantime. In such a case, by appropriate direction of this House, any mischief so done is undone.

In other words, it is possible that the only question is whether the party appealing has so conducted himself as to make restitution impossible or inequitable. However, I have formed and express no final opinion on the matter. In the result, it is established that the workman has the right of appeal which was reluctantly denied him by the Court of Appeal, and the case must be remitted to that court in order that the appeal may be heard. The appellant must have the costs of the hearing in the Court of Appeal and of the appeal to this House, so far as they are applicable to pauper appeals.

Lord Russell of Killowen : My Lords, we are differing from, and reversing, a decision of Slesser, Clauson and Goddard, L.JJ., which, however, they reached with just reluctance, and only under the compulsion of earlier authorities by which they were bound. These being the circumstances in which their judgments come before us for consideration, I do not think that comity requires me to make a detailed statement of the reasons which influence me in supporting a motion for allowing the appeal. I have had an opportunity of reading and considering beforehand the opinions of my noble and learned friends Viscount Maugham and Lord Atkin. They express fully and accurately my own views, and I shrink from adding anything, lest, in the process, I should have the misfortune to detract from their weight.

Lord Wright [read by Lord Russell of Killowen]: My Lords, the question in this appeal is whether *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1) was rightly decided. There is no controversy that the facts of the present case bring it within the ruling of that decision, which has governed similar cases for more than a quarter of a century. I am bound to confess that, like the members of the Court of Appeal, who in the order now under review followed that decision, I regard it as not merely erroneous in law, but also, to adopt the language of Clauson, L.J., a shock to one's sense of justice. Here is a working man who, in order to seek relief, has to come to this House as a pauper because he has been held to be barred from his statutory right of appeal, not by anything in an Act of Parliament, but by a judicial decision. The county court judge has awarded him a sum as compensation and costs. No one disputes his right to either. He complains, however, that the award is erroneous, in that he has not been awarded enough compensation, because his incapacity continued beyond the date fixed by the judge, and also in that he has not been given a declaration of liability. If the order appealed from stands, he is barred from his appeal on these matters simply because he has accepted the amount of the award when it was sent spontaneously to him by the employers, as was also the amount of the taxed costs. He is admittedly entitled to both of these sums in any case. They stand entirely outside the further claims which he made in the arbitration and wishes to make in the appeal. What he was awarded and what he received consisted of arrears of compensation withheld, but now conclusively found to be due and owing to him. He is a wage-earner with a wife and children. It would be cruel if he were held to be prevented from applying these belated payments to the pressing necessities of himself and his family, except at the cost of being deprived of the right of appeal given him by statute. It is said that he ought to have waited until the appeal was heard, which might not be for many months. If he does not wait, or if he accepts the proffered payment, his appeal, it is held, is barred, and that even though he does so in ignorance of the fact that he is sacrificing his right to appeal. *Johnson's* case (1) has bound subsequent Courts of Appeal ever since 1913. There is no court which could overrule it except this House. For some reason, no litigant has had the courage or the money to bring it before this House, and this unfortunate doctrine of law has remained in force because the remedial powers of this House are dependent on some private litigant at his own expense or initiative bringing up the question by way of appeal. Such is the English system. However, notwithstanding that the decision has been followed so long and so often, and has no doubt become regarded in certain quarters as an established rule, this House has the duty to reconsider it when at last it is brought before it, and to set it aside if it is seen to be contrary to justice and convenience. There is in this case none of the considerations which in some other appeals have made the House refuse to disturb an established rule.

A The rule in *Johnson's* case (1) was thus stated in compendious and positive terms by SCRUTTON, L.J., in *Reeves* v. *Smith (S.) & Sons* (3), at p. 192:

> On the decided cases, it is clear that if it is desired to appeal against an award there must be no acceptance of any money under it.

B The question at once arises on what principle a rule so apparently unfair and anomalous was based. *Johnson's* case (1) was the decision of a strong court. It is no disrespect to the eminent judges who decided it to observe that even a strong court may, like Homer, on occasion nod. On full consideration, I find it impossible to support the decision. C *Johnson's* case (1) presented no unusual features. The compensation awarded was not in issue. It was clear that the workman was entitled to an order for costs, but the judge, for reasons which appeared to him to be good, ordered a set-off in respect of a certain part of the employer's costs. The workman accepted payment of the undisputed compensation D and the undisputed costs, but he served a notice of appeal limited to the order as to the set-off of costs. The employers took a preliminary objection, contending:

> . . . that the order dealt with compensation and costs as a whole, and the applicant has accepted and acted upon it.

E The procedure originally contemplated by the Workmen's Compensation Act was that claims should be settled by arbitration, but it was competent to bring the arbitration in the county court before the county court judge as arbitrator. To-day, the great majority of such claims are thus dealt with in the county court. There are statutory F rules governing the procedure there, and in effect equating the procedure in such claims to those in an ordinary action. In particular, the rules as to appeals are put on the same footing as ordinary appeals from county courts: the Workmen's Compensation Act, 1925, Sched. I (4), and the rules made under it. Thus, the Rules of the Supreme Court G as to appeals from county courts apply. Of these rules, I need now refer only to part of one rule—namely, R.S.C., Ord. 58, r. 4, which enables a notice of appeal to ask that part only of the decision appealed from should be reversed or varied. Thus, the precise effect of the rules is to treat the order as appealable in part, and thus to recognise that it H need not be regarded as a single indivisible whole. To apply this to *Johnson's* case (1), it follows in the precise terms of the rule that the part of the order as to costs was capable of being regarded as a separate and distinct part of the judgment, for purposes of being separately appealed against. Equally, in the present case, that part of the judgment which refused compensation beyond a certain date and that part which, in effect, though *sub silentio*, refused a declaration of liability constitute severable and distinct parts of the judgment, as to which R.S.C., Ord. 58, r. 4, enables an appeal that these parts of the judgment should be reversed or varied.

In so far, therefore, as *Johnson's* case (1) and those which have followed it, including the order appealed from, proceeded on the basis that the award was one entire indivisible award, they were in flat contradiction of the statutory rules regulating the right of appeal. I do not know if the fact that judgments of county court judges in workmen's compensation cases are called awards has led to some confusion. In arbitration in the ordinary sense, the award is the fruit of a consensual agreement under which the parties have agreed to accept the arbitrator's award, which thus governs them by their agreement. There is no appeal in the proper sense of the term. The court has certain powers over arbitrators, which the parties may invoke. Thus, a party may claim that the award was made without jurisdiction, or that the arbitrator was guilty of misconduct, and that, for these or other like reasons, the award should be set aside. A party who has treated the award as valid, for instance, by accepting payment of what it awarded him, would generally be barred from adopting the inconsistent attitude of claiming to set it aside. It might then be said that he could not affirm and disaffirm, or perhaps even that he could not approbate and reprobate. I think it is clear, however, that the position in a case like the present, that of an award by the county court judge, which is put on the same footing as an ordinary judgment of the court, is an entirely different matter. I cannot see how questions of election or of approbating or reprobating come into the matter at all in any ordinary case of this class. The workman, when he decides to appeal, exercises a choice between appealing and not appealing, and, when he decides to appeal, exercises a choice whether he will appeal against the whole or against any part of the award. In the latter event, as in the former, he is exercising a legal right, just as in the case of an appeal in an ordinary action. The part of the order from which he does not appeal—especially if it is not attacked, but is accepted by the opposite party—gives him a present vested right, independently of the separate matters on which he desires to appeal and independently of the question whether or not he appeals. I do not see why he should not be entitled to receive, or even to enforce payment of, what the court has awarded him, or how that can affect his rights to appeal on other independent parts of the judgment. It is true that, even where there is no cross-appeal, the Court of Appeal may in some cases modify or reform a judgment which is brought before it on appeal. If that affects payments already made, the court might, in a proper case, order compensation. However, questions of that type cannot arise, or at least are not likely to arise, in cases like the present.

In *Johnson's* case (1), however, the Court of Appeal, having held that the award was one entire award, proceeded to decide the appeal by applying the principle, rule or maxim that one cannot both approbate and reprobate. I am induced here to quote the language of LORD ESHER, M.R., in *Yarmouth* v. *France* (17), at p. 653:

> . . . I detest the attempt to fetter the law by maxims. They are almost invariably A misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.

Indeed, these general formulæ are found in experience often to distract the court's mind from the actual exigencies of the case, and to induce the court to quote them as offering a ready-made solution. It is not safe B to act upon them, however, unless, and to the extent that, they have received definition and limitation from judicial determination. How this has happened in respect of the doctrine of "approbation and reprobation" has been fully and clearly explained by my noble and learned friend VISCOUNT MAUGHAM. Indeed, the formula in its more precise and C technical significance has become an equivalent, derived from Scots law, of the equitable doctrine of election. The formula is also sometimes used to indicate the position where a person takes benefits under a deed and is held bound, because of his conduct in so doing, by conditions expressed in the deed, though he has not executed it. In such and similar D cases, the formula becomes, as it were, a label, and lawyers know when and where to apply it. A more doubtful, but still not infrequent, use of the formula is in cases of common law election, where there is a choice between alternative and inconsistent remedies—for instance, between charging a defendant in tort and charging him for money had and received, E or between charging the principal and charging the agent. In these latter cases, the alternatives are mutually exclusive. In the cases of equitable election, the conscience of the defendant is affected, because, in the language of LORD CAIRNS, L.C., quoted by VISCOUNT MAUGHAM from *Codrington* v. *Codrington* (7), at p. 861, it would be inequitable that he F should

> . . . accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.

It is, in my judgment, impossible to apply any such idea to the present case. The appellant was doing nothing inequitable or inconsistent. In G taking the moneys which the respondents sent him in satisfaction of the sums actually awarded, he was exercising a legal right to be paid what was admittedly due to him. In serving his notice of appeal, he was exercising another and independent legal right—namely, the right to claim that the award should be reversed or varied in part, because it H did not give the further relief to which he claimed to be entitled. I cannot see how the maxim or formula in any judicially recognised meaning can apply to this case. There is no question here of alternative or mutually exclusive rights between which the appellant had to choose. Even if it were (which it is not) a case of election, there is furthermore no evidence of the essential elements of election—namely, the presence of knowledge of the position and intention to elect. I agree with the reservations made by my noble and learned friend LORD ATKIN on the question whether there may not be cases where a statutory right to appeal may be lost. Like him, I prefer to leave such cases for consideration if and when they arise. The appeal should, in my opinion, be allowed.

A

LORD ROMER: My Lords, I agree.

Appeal allowed with costs.

Solicitors: *L. O. Glenister & Sons* (for the appellant); *Carpenters* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*] B

HOLLIS *v.* WINGFIELD AND OTHERS.

[CHANCERY DIVISION (Farwell, J.), **January 31, 1940.**] C

Mortgage—Accounts—Mortgagee in possession—Sum received for principal and interest—Whether mortgagee entitled to deduct amount of tax on interest.

A mortgagor mortgaged certain shares in a company to a first mortgagee for £7,000 and interest, which was later reduced to approximately £5,000. The company went into liquidation, and the liquidator paid to the first mortgagee from the proceeds of sale of the company's D property an amount of some £9,000, and the first mortgagee became to that extent a mortgagee in possession. The mortgagor had also created a second mortgage. In a redemption action brought by the mortgagor, an account was ordered of the dividends and sums received by the first mortgagee in respect of the mortgaged shares. The first mortgagee filed an account showing certain sums which she had deducted from interest received, and paid to the revenue as income tax E in respect of this interest. The mortgagor contended the first mortgagee was not entitled to deduct the sums so paid as income tax:—

HELD: the first mortgagee was entitled to discharge the amount of the tax for which she was liable out of the moneys which she had received as interest on the mortgage.

[**EDITORIAL NOTE.** The point here decided is purely on the question of F accounting by a mortgagee in possession. The matter is of great importance to mortgagees in possession now that the rate of income tax has increased so greatly, but few mortgagees take possession of the mortgaged property.

AS TO ACCOUNTING BY MORTGAGEE IN POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 396-404, paras. 591-605; and FOR CASES, see DIGEST, Vol. 35, pp. 647-651, Nos. 3775-3839.] G

ADJOURNED SUMMONS for determination of the question whether a mortgagee of certain shares of a company in liquidation was entitled out of interest moneys in her hands to discharge the amount of income tax for which she was liable in respect of such interest. H

J. Norman Daynes, K.C., and *C. A. J. Bonner* (for *J. A. Brightman*, on war service) for the plaintiff.

Herbert Hart for the second mortgagee.

Cyril King, K.C., and *G. D. Johnston* for the defendant, the first mortgagee.

Farwell, J.: This is a summons taken out in an action which raises a rather unusual question with regard to the incidence of income tax in the case of certain mortgaged property. The question arises in these circumstances. There was a mortgage, dated Sept. 26, 1930, under which the plaintiff mortgaged certain shares he held in a company known as the First Worthing Garden City. He mortgaged these shares to a Miss Finch, to secure a sum of £7,000 odd at 8 per cent. interest. The mortgage was reduced subsequently, and I think that the amount of principal which is due is £5,000 odd. The company has gone into liquidation. There has been a liquidation for some time, and the moneys which have been realised by the sale of the various properties belonging to the company have been in the hands of the liquidator. The liquidator has very properly utilised this fund in paying to the first mortgagee the amounts in his hands. The first mortgagee has received these amounts, and, therefore, is to that extent mortgagee in possession. The mortgagor now desires to redeem. He has created a second mortgage, and the second mortgagee is, of course, interested in seeing that the money in the hands of the first mortgagee is not used except for necessary purposes, so that there may be more available to discharge his debt.

In the action, an order was made on Nov. 28, 1938, under which it appears that, the plaintiff by his counsel offering to redeem the Finch mortgage on a certain basis, the following accounts were ordered to be taken:

> An account of what is due to the defendant Edith Barbara Finch on the basis of her said amended defence under or by virtue of the Finch mortgage, and in taking such account the principal sums mentioned in the Pergolas mortgage and the Finch mortgage respectively are not to be treated as settled accounts. (2) An account of all dividends and other sums received in respect of the shares comprised in the Finch mortgage by the said Edith Barbara Finch and George William Finch or either of them, or by any other person or persons by the order or for the use of the said Edith Barbara Finch and George William Finch or either of them or which since Dec. 30, 1932, might without the wilful default of the said Edith Barbara Finch and George William Finch or either of them have been so received.

That order being made, an affidavit was made by Miss Finch, and an account was put in by her. In fact, there were two accounts. The first account, which was in the usual form in a redemption action, showed the amount due for the interest and for the capital. The amount due for interest in each case is shown as a sum less tax. The total figure is arrived at in that way. The second account shows the moneys which the first mortgagee has actually received from the liquidator, and shows it in three sums, making a total sum of just under £9,000. Thus, I think that it is clear on these accounts that there will be a surplus in the hands of the first mortgagee after the amount due to her has been satisfied, and that amount will be available, of course, for paying off the second mortgagee. Before the mortgagor can recover the property, of course, the second mortgagee will have to be satisfied.

Those accounts having been put in by Miss Finch in Feb., 1939, and verified by affidavit, subsequently, on July 25, 1939, Miss Finch put in

another affidavit in which she sought to amend the account which she
had put in. The amended account was based on this footing. It
appears that in 1936 Miss Finch got into communication with the
inspector of taxes for the suitable district with regard to the income
tax payable on the interest payable to her under the mortgage. Certain
correspondence took place between her solicitors and the income tax A
authorities, with the result that ultimately the liability to tax in respect
of such interest was agreed at a certain sum, and that sum was duly
paid by Miss Finch to the income tax authorities. I think that the
actual payment—anyhow, the actual assessment—was made at a time
when she had received the whole of the sums payable by the liquidator. B
According to her second affidavit—and I see no reason to doubt it—
when the first account was put in and the first affidavit was sworn, the
fact that she had paid this amount of income tax had been overlooked.
She therefore desired to put in an amended account, under which credit
would be given for, or under which she would be allowed to treat, those C
sums she had paid as moneys which she was entitled to recover as against
the mortgaged property. She put in an account based on that footing.

The plaintiff and the second mortgagee, who appear before me, object
altogether to that course being adopted, and they say that the proper
and only way of taking an account of this sort is the way in which Miss D
Finch first proposed that the account should be taken—namely, by
allowing in the account the amount due for interest less tax in each
case. It is said that, unless that course is pursued, in some way the
second mortgagee will be damnified, and it was even suggested that in
some way it would hurt the mortgagor. At any rate, it is said that it E
will turn out badly for the second mortgagee, and possibly for the
mortgagor.

The position seems to me to be this. In July, 1936, Miss Finch had
in her hands large sums representing both capital and interest, some
of which was due to her as first mortgagee. She would ultimately have F
to bear income tax upon so much of that sum due to her as represented
interest. Knowing that, she communicated with the revenue authorities,
and the amount which was properly payable for income tax was
agreed and paid. Under the Income Tax Acts and Rules, it is quite
clear that, if the mortgagor has in his hands money out of which he has G
to pay interest to the mortgagee, he is bound, and the mortgagee is
bound to permit him, to deduct from that amount the sum properly
payable for income tax before the balance is paid over to the mortgagee.
That is a provision made for the purpose of enabling the collection of
the tax to be made most easily. The person who has the money in his H
hands is made the person to see that payment is made. The payment
being so made, however, is made, not out of the money of the payee,
but out of the money of the person to whom the money belongs. The
payment is made by the mortgagor as agent for the mortgagee. The
mortgagor's liability to pay is only, in my judgment, a liability to pay

out of the money which is in his hands, or which passes through his hands, but which in fact belongs to the mortgagee. He is under no personal liability to pay anything out of his own pocket, and, if he never has in his hands any money payable to the mortgagee, apart from the question of tax, then he is under no liability at all, so far as tax is A concerned.

In the present case, the mortgagor has not had in his hands—and so far as I can see, until the first mortgagee and the second mortgagee have been satisfied, he never will have—any part of the moneys which represent the security. Therefore, he never has had the money, and never has B become liable to pay tax. The person who is liable to bear the tax on the interest on the mortgage is the mortgagee, who has had the money, and is liable as the person who has received the money, and must account for the tax. In my judgment, the mortgagee, in taking the course which she took in this case of discharging her liability for the tax out C of the moneys in her hands, was not doing anything which she was not entitled to do. If the mortgagor had money out of which he had to pay the mortgagee, then the mortgagee would get no money except subject to the deduction of tax, which the mortgagor was bound to make. If the mortgagor has no money in his hands at all, but the money does D in fact get into the hands of the mortgagee, then, in my view, the mortgagee is bound to see that the income tax on the interest is duly paid. If she takes that course, and if she does in fact discharge the income tax out of the moneys in her hands, then she must be entitled, as it seems to me, when it is a question of taking an account to see what is due, E to have it taken on the footing that the mortgagor does not deduct tax which the mortgagee has already paid out of her own pocket.

It is said that the second mortgagee will be damnified by that course, but I confess that I feel great difficulty in appreciating that. The second mortgagee is entitled to nothing until the first mortgagee has been fully F satisfied as to principal, interest and costs. When the interest is being paid, a portion of the interest has to go to the Inland Revenue for income tax. So far as the second mortgagee is concerned, whether the person who pays that is the first mortgagee or the mortgagor seems to me to make no difference, because in any case it is a sum of money which G has to be found and paid to the Inland Revenue, and which is treated for the purposes of payment as the money of the first mortgagee. In my judgment, in the present case the mortgagee is right in saying that she is not bound to submit to an account on the footing of the first account she put in. I am not quite sure that I think her second account H is quite accurate, or quite the right way of doing it. I should have thought that the right way of doing it was to have an account taken of the principal and interest, but, in calculating the interest, not to make any deduction for tax. The mortgagee will then get the full amount of the tax out of the money, and she will, therefore, get back again, as it were, the amount which she has already paid in respect of income tax.

No doubt the form of taking the account which was first suggested is the ordinary way of taking an account in chambers, and I am not suggesting for a moment that it is not the right way of doing it in an ordinary case. However, this is by no means an ordinary case. Here the property is proceeds of sale. That is to say, the mortgaged property is represented by proceeds of sale in the hands of the liquidator which were handed over to the first mortgagee, and the first mortgagee has had the money, and has the money in her hands, while the mortgagor has never had the money, and never will have the money in his hands. The first mortgagee is entitled, in my view, to discharge the amount of the tax for which she is liable out of the moneys which she has received, or ought to receive, as interest on this mortgage. When she has paid that, then, when the account is taken, in my judgment, it should be taken on the footing that no deduction should be made in respect of tax. I think that that really answers the question raised by the summons.

Solicitors: *Evill & Coleman* (for the plaintiff and the second mortgagee); *Fladgate & Co.* (for the first mortgagee).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

ABINGDON BOROUGH COUNCIL *v.* JAMES.
ABINGDON BOROUGH COUNCIL *v.* THANE.

[Chancery Division (Simonds, J.), **December 14, 15, 19, 1939, February 7, 1940.**]

Water Supply—Water mains—Buildings over mains—Buildings purchased by defendants without knowledge of existence of mains—Right of local authority to order for demolition—Waterworks Clauses Act, 1847 (c. 17), *ss.* 20, 21 —*Public Health Act*, 1875 (c. 55), *s.* 26—*Public Health Act*, 1875 (*Support of Sewers*) *Amendment Act*, 1883 (c. 37), *s.* 3—*Public Health Act*, 1936 (c. 49), *s.* 25.

The plaintiff council, in pursuance of certain powers conferred upon them by statute, constructed a number of water mains which passed under land situate outside their district. A., the owner of the land at the time the mains were laid, received compensation for damage in connection with their laying and maintenance, and later sold the land to one L., who had notice of the existence of the mains. L. built two houses on the land, and sold these houses to the defendants in these actions, who had no knowledge of the existence of the mains. The plaintiffs claimed, *inter alia*, an injunction to restrain the defendants from permitting their houses to remain on the land so as to prevent the free access by the plaintiffs to the water mains for the purpose of maintaining and repairing them. On behalf of the plaintiffs, it was contended that the defendants, as owners of servient tenements, were not entitled to render the exercise of the plaintiffs' right of access to the water mains impossible or substantially more difficult, and that, furthermore, if the defendants' houses were allowed to remain on the land, the performance of the plaintiffs' statutory duty to inspect, maintain and repair the water mains would be rendered practically impossible, and that, for these reasons, the plaintiffs were entitled to a mandatory injunction ordering the demolition of the defendants' houses. On behalf of the defendants, it was contended, *inter alia*, that, as the plaintiffs had failed to deposit a map or plan of the water mains in question with the local rural district council as required by statute, they were not entitled to a mandatory injunction. It was further contended that, as the Public Health Act, 1936, s. 25 (3), prescribed the manner in which, and the procedure by which, buildings built over water mains might be ordered to be demolished, the jurisdiction of the court to make a mandatory order was thereby ousted, or, alternatively, that the court had a discretion not to exercise that power, and ought to refuse to do so :—

HELD : (i) as the plaintiffs' right of access to the water mains had been infringed by the erection of the defendants' houses, the plaintiffs were entitled to the injunction asked for, whether or not they had failed to deposit a map or plan in accordance with the statutory requirements.

(ii) as the plaintiffs' consent to the erection of the defendants' houses had never been asked, the Public Health Act, 1936, s. 25 (3), did not apply.

semble : where a main is laid outside the district of a local authority, the builder of a house in another district through which that main passes is not required to obtain the consent of that local authority. He need only obtain the consent of the local authority within whose district he builds.

[**EDITORIAL NOTE.** In this case, a decision has been reached without finding it necessary to determine whether the local authority could only proceed under the Public Health Act, 1936, s. 25 (3), by way of notice to the defendants to pull down the buildings, which notice might have been questioned before the local magistrates by the defendants in the usual way as " persons aggrieved." It was argued that this special statutory remedy was an exclusive one, and precluded the authority from seeking any other, but the case has been decided on other grounds.

AS TO WATER MAINS, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 259, 260, para. 483 ; and FOR CASES, see DIGEST, Vol. 43, pp. 1061, 1062, Nos. 28-36.]

Cases referred to :

(1) *Goodhart* v. *Hyett* (1883), 25 Ch.D. 182 ; 19 Digest 80, *483* ; 53 L.J.Ch. 219 ; 50 L.T. 95.

(2) *Birkenhead Corpn.* v. *London & North Western Ry. Co.* (1885), 15 Q.B.D. 572 ; 41 Digest 20, *156* ; 55 L.J.Q.B. 48.

(3) *Thurrock, Grays & Tilbury Joint Sewerage Board* v. *Goldsmith* (*E. J. & W.*), *Ltd.* (1914), 79 J.P. 17 ; 19 Digest 81, *485*.

(4) *Metropolitan Water Board* v. *London & North Eastern Ry. Co.* (1924), 131 L.T. 123 ; 43 Digest 1068, *72*.

CONSOLIDATED ACTIONS to restrain the defendants from permitting certain buildings, their property, to remain on certain land so as to prevent the free access by the plaintiffs to water mains laid under the land. The facts are fully set out in the judgment of SIMONDS, J.

W. P. Spens, K.C., and *F. McMullan* for the plaintiffs.

J. Leonard Stone for the defendants.

SIMONDS, J. : In each of these actions, the plaintiffs claim an injunction to restrain the defendant from permitting his dwelling-house in Lashford Lane, Dry Sandford, in the parish of St. Helen Without, in the county of Berks, from remaining thereon so as to permit their free access to their water main under such dwelling-house for the purpose of repairing and maintaining it.

In 1933 and 1934, the plaintiffs, in exercise of the powers conferred on them by the Public Health Act, 1875, and the Abingdon Water Order, 1931, constructed and laid a 9-ins. water main (I take the words of the order):

> . . . from land owned by the corporation southwards along the public highway known as Dry Sandford Lane for a distance of about 160 yds. and thence in a south-easterly direction for about 1,300 yds. across certain fields in the parish of St. Helen Without to the public highway known as Wootton Road and then in a south-easterly direction along the Wootton Road for a distance of about 600 yds. to their existing waterworks at the junction of the Wootton Road and Foxcombe Hill.

The land in question is outside the district of the plaintiffs and within the district of the Abingdon Rural District Council. For part of its course, the main so laid passed into and under the land of one Amey, who claimed and received compensation for the exercise by the plaintiffs of their rights. He was content to accept a sum of £36 5*s.*, which, in the receipt signed by him, dated Feb. 6, 1935, was expressed to be:

> . . . compensation for any past present or future damage in connection with the laying and maintenance of a water main and any other works by the corporation between Lashford Lane and to their Wootton waterworks.

Shortly thereafter, Amey sold the land to one Francis Herbert Lister, with full notice of the existence and line of the main. Lister proceeded to build upon the land, and in particular built two houses, one called The Chateau, which he afterwards sold to the defendant Thane, and the other called Croesaw, which he afterwards sold to the defendant James. It was established to my satisfaction that the main passes diagonally right under the centre of The Chateau and passes under the corner of Croesaw. The defendants did not know this fact. It appears that they purchased through a building society. They did not, nor did anyone on their behalf, ask the familiar question whether there were any easements affecting the land proposed to be sold, and Lister did not volunteer the information. As a result, they find themselves in their present predicament. It is necessary to state one more fact before considering the legal position of the parties. Speedy access to the main for the purpose of inspection and repair is said to be of peculiar importance. The pipe is of cast iron, with leaden sockets, and it is laid at some distance below the surface. The task of construction was difficult, it being often necessary to blast through the solid rock. The pipe works as a syphon, so that a crack which let in the air would have far more serious consequences than the waste by leakage of a certain amount of water. It would, according to the evidence before me, result in the complete stoppage of an important part of the plaintiffs' water supply. Hence the necessity for speedy access. In these circumstances, the plaintiffs contend that they are entitled to the relief claimed by the writ.

Under the Public Health Act, 1936, s. 119, which replaces the Public

Health Act, 1875, s. 54, they have the like powers and duties, and are subject to the like restrictions in respect of the laying and maintenance of water mains within or without their district, as they have and are subject to in respect of the construction and maintenance of public sewers. Amongst their duties, there is that prescribed by sect. 23—A namely, to maintain, cleanse and empty all sewers vested in them, or, *mutatis mutandis*, to maintain all water mains vested in them.

They say, in the first place, that they have the right which every dominant owner has to enter upon the servient tenement for purposes of maintenance and repair, and the right to require that the servient B owner shall not render the exercise of that right practically impossible or substantially more difficult. They say, in the second place, that this view of their rights is supported by the fact that they are under a statutory duty, which the erection of these houses makes it substantially more difficult, if not practically impossible, for them to perform.

C There has been some discussion before me as to which of the phrases "substantially more difficult" or "practically impossible" is the appropriate one. In *Goodhart* v. *Hyett* (1), where the facts were very similar to those in the case before me, except that there the plaintiff did not assert a statutory duty and the defendant had not begun to D build over the line of pipes, NORTH, J., uses these words, at p. 187:

> But the fact that the plaintiffs would continue to have the right to do it [to enter and repair] is not enough. They must have the opportunity and the means of doing it . . . In my opinion they will not, and my reason is this . . .

Having given his reason and further discussed the position, NORTH, J., E says, at p. 189:

> . . . it seems to me that the plaintiffs will not have the same opportunity that they had before, and will not have reasonable means of access for the purpose of doing such repairs as must necessarily be wanted, and therefore that the defendant is doing something which interferes with the right of the plaintiffs.

Upon this footing, NORTH, J., granted the appropriate injunction.

F In *Birkenhead Corpn.* v. *London & North Western Ry. Co.* (2), the facts were that the plaintiffs claimed compensation from the defendants on the ground that access to a sewer which was vested in them under a local Act had been rendered more difficult and expensive by G reason of the defendants having constructed an embankment over it. Their claim was dismissed upon a consideration of the local Act which conferred upon them the right to construct a sewer, and vested it, when constructed, in them. That Act gave them no express right of access to the sewer when constructed, and it was held that the true rule of H construction was not to imply any more right of access than was reasonably necessary to enable them to perform their duty. BOWEN, L.J., said, at pp. 579, 580:

> . . . one ought only to imply that the statute gave the commissioners such powers as were reasonably necessary for the efficient working of the sewer system. For the purpose of so working it no particular mode of access, nor any particular degree or convenience of access is wanted, but all that is wanted is a right to go on the land of the owner and to get to the sewer, and such owner is not to do any-

> thing which would make it practically impossible for the plaintiffs to go on such land and exercise such right.

In *Thurrock Grays & Tilbury Joint Sewerage Board* v. *Goldsmith (E. J. & W.), Ltd.* (3), a somewhat similar question came before Eve, J., but, inasmuch as he distinguished the *Birkenhead* case (2), upon the ground that the canon of construction applied in that case was not properly applicable to a contract such as he had to consider, I am not able to derive any great assistance from his judgment.

In *Metropolitan Water Board* v. *London & North Eastern Ry. Co.* (4), Tomlin, J., adopted the language of North, J., in *Goodhart* v. *Hyett* (1), and held that the defendants were not justified in an operation which would substantially diminish the reasonable access of the plaintiffs to their main for the purposes of inspection and repair, notwithstanding that they claimed to be protected by the terms of their agreement.

No other case was cited to me in which this aspect of the right of access of the dominant owner has been discussed. It is, however, in my judgment, unnecessary for me to seek to define with nicety the measure of interference with the right of access for purposes of repair which is enjoyed by the dominant owner, in which expression I include a statutory authority invested with a duty of maintenance. Whatever test is adopted, "material interference," "substantially greater difficulty" or "practical impossibility," I must come to the conclusion, upon the facts of this case, that the plaintiffs' right of access has been infringed. It is true that for very many years they might not require to inspect or repair the main where it passes under the defendants' houses. Nevertheless, it is true also that they may require to do it at any time, and to do so with the least possible delay. It is suggested that they could do anything which had to be done by tunnelling from outside the walls of the houses. This appears to me to be a theoretical rather than a practical possibility. I see no reason to suppose that even in the *Birkenhead* case (2) the court intended to impose upon the dominant owner so heavy a burden. It is not to be forgotten that, inasmuch as the plaintiffs' easement is exercised by means of a pipe laid in the servient tenement, they might be liable to the servient owners to make good any damage done by the pipe falling into disrepair, apart altogether from the statutory duty of repair. In these circumstances, the plaintiffs are entitled to relief, unless the defendants can make good any of the contentions to which I shall next refer, and, if they are entitled to relief, they are, in my judgment, entitled to a mandatory order.

The defendants, however, urge a number of reasons why a mandatory order should not be made. In the first place, they say that the plaintiffs stood by and knowingly allowed these houses to be built along the line of the main without protest. Upon the facts, I find that this contention is ill-founded. It was not until after the event that it was brought to the knowledge of any responsible officer of the plaintiffs that the houses had been so built. On the other hand, it appears that the defendants' predecessor in title, Lister, was told by Amey, and knew where the main lay, and nevertheless built over it.

In the second place, the defendants say that the plaintiffs were requested by the combined effect of the Waterworks Clauses Act, 1847, ss. 20, 21, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, s. 3, to deposit a map or plan of the main with the Abingdon Rural District Council, and that, not having done so, they are not entitled to a mandatory order. Assuming, without deciding it, that these sections had any application to the present case, I am unable to see why the plaintiffs' failure to comply with the provisions of the section should debar them from relief. The statute provides the appropriate penalties for non-compliance with its provisions. It would not, in my judgment, be right further to penalise the plaintiffs by making more difficult the discharge of their statutory duty.

Finally, it was urged that the Public Health Act, 1936, itself prescribes the circumstances and the manner in which a building built over a water main may be ordered to be pulled down, and that the jurisdiction of the court to make a mandatory order to that end is either ousted or, as a matter of discretion, ought not to be exercised. This contention requires an examination of the relevant provisions of the Public Health Act, 1875, and the Public Health Act, 1936. It was not until the Rural District Councils (Urban Powers) Order, 1931, made under the Local Government Act, 1894, s. 25, put the Public Health Act, 1875, s. 26, into force throughout England and Wales as from July 22, 1931, that it was a statutory offence to build over a sewer or main in a rural district. If the local authority in whom the sewer or main was vested wished to prevent the erection of such a building, or to have it removed when built, they had no special statutory remedy, but had to go to the proper court for relief. I do not doubt that in a proper case they would have obtained a mandatory order. Under the Public Health Act, 1875, s. 26, any person who in an urban district, without the consent of the urban authority, caused any building to be newly erected over a sewer of the urban authority was liable to forfeit to the urban authority a certain sum, and, further, the urban authority were authorised themselves to pull down the offending building and to recover in a summary manner from the offender any expenses incurred by them in doing so. It could not, I think, be argued that, if an urban authority had preferred not to perform the work of demolition, with the possible risk of exceeding their statutory powers, and accordingly had gone to the court for relief, the court could not, and would not in its discretion, have made a mandatory order if the circumstances justified it. The same considerations necessarily apply to a rural district council after the coming into force of the 1931 order to which I have referred.

The Public Health Act, 1936, which came into force on Oct. 1, 1937—that is, after the main here in question had been laid and the houses built over it—made an alteration in the law. It provides by sect. 25 (1) that, where plans of a building are, in accordance with building byelaws, deposited with a local authority, and it is proposed to erect the building over any sewer or drain which is shown on the map of sewers required by Part II of the Act to be kept deposited at the offices of the authority, the authority shall reject the plans unless they are satisfied that, in the circumstances of the particular case, they may properly consent to the erection. By sect. 25 (3), it is further provided that, if, after the commencement of the Act, a building has been erected over a sewer without such consent (if any) as, under the Public Health Act, 1875, s. 26, was required at the date of the building, the local authority may by notice require the owner of the building to pull it down or to alter it in such manner as may be necessary, and, further, that the provisions of Part XII of the Act with respect to appeals against, and the enforcement of, notices requiring the execution of works are to apply in relation to any notice given under subsect. (3). This in effect provides for appeal against notices to a court of summary jurisdiction, and gives that court wide powers of dealing with the situation in an equitable way.

It is sect. 25 (3) upon which the defendants rely. They contend that their houses were not built without the consent required under the Public Health Act, 1875, s. 26, at the date of building, but that, if they were built without such consent, then the plaintiffs have their remedy under the subsection, and ought not to be granted any other relief. In my judgment, however, the subsection has no application to the present case. The defendants' houses were erected with the consent, not of the plaintiffs, but of the Abingdon Rural District Council, which was, no doubt, for certain purposes, the proper authority to give such consent, but either did not know or did not care whether or not the building was over the line of the water main which was vested in the plaintiffs. The plaintiffs, whose concern it was whether the houses were built over their main, were not asked their consent.

It appears to me that there is in fact a gap in the Acts. Where a main is laid outside the district of the local authority, and it is desired to build a house over it, the builder does not appear to be required by the Public Health Act, 1875, to obtain the consent of that local authority. He must, without any reference to sewers or mains, submit his plans to the local authority within whose district he builds. He did so in this case, and obtained an approval, which, no doubt, was given after proper consideration of the matters which the Abingdon Rural District Council were bound to consider, but without regard to the plaintiffs' rights and duties, and without their knowledge. I have not had pointed out to me any provision, either in the old law or in the new, which requires the local authority in whose district a house is built to consult or communicate with the local authority over whose mains or sewers buildings are erected. The Public Health Act, 1875, s. 26, deals with the case of a person doing something in an urban district without the consent of the urban authority, and as extended by the order of 1931 to a person doing something in a rural district without the consent of the rural authority. It appears to have introduced the doing of something in a rural district without the consent of the urban authority who will be affected by the order. This being the position, it seems that it cannot be predicated of the houses A now in question that they were erected over the main "without such consent, if any, as, under the Public Health Act, 1875, s. 26, was required at the date of the erection of the building," for that can only refer to the case where the section requires the consent and the buildings are, in disregard of the statute, built without it. It was urged that this interpretation B does not give effect to the words "if any," and that the section is applicable where no consent of the local authority is required. This is not, in my judgment, the true meaning of the section. The words "if any" are inserted just because, before the 1931 order, no question of consent arose in a rural district. They cannot, in my judgment, have C the effect for which the defendants contend.

It follows that the plaintiffs cannot avail themselves of the statutory remedy provided by the Public Health Act, 1936, s. 25, and it is unnecessary for me to consider the difficult question whether or not, if they could, that remedy is exhaustive and excludes them from any other D relief to which they might otherwise be entitled. I am unable, then, to accept any of the defendants' pleas, and must give the plaintiffs the relief which they claim. I am reluctant to make, as the plaintiffs themselves were reluctant to ask for, a mandatory order, but I see no real alternative. It would not be right to leave matters as they are, with a E mere declaration of rights. The plaintiffs have duties the neglect of which might have serious consequences for a number of people. They may, at some near or at some distant time, find it necessary to inspect or repair their main where it lies under the defendants' houses. They could do so, as matters now stand, only by breaking through the floors F and foundations of the houses or by tunnelling under them. This is not, as I have already said, a burden which ought to be put upon them. Apart from that, however, it is at least possible that, at a time when this contest has been forgotten, the occupants might strenuously object to the plaintiffs exercising their rights in a manner gravely interfering with G their comfort, and, on one side or the other, an appeal to force might be made. Force is the sanction of the law, but its exercise must be invoked by process of law. It is, I think, my duty now to make an order which will avert this possibility of further dispute. I must accordingly make a mandatory order in the terms of the claim, and the defendants must H pay the costs of the action.

Injunction granted with costs. Operation suspended for one year.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. C. Croasdell*, Town Clerk, Abingdon (for the plaintiffs); *Preston, Lane-Claypon & O'Kelly*, agents for *Andrew Walsh & Son*, Oxford (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

TREBANOG WORKING MEN'S CLUB AND INSTITUTE, LTD. *v.* MACDONALD.
MONKWEARMOUTH CONSERVATIVE CLUB, LTD. *v.* SMITH.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Hilbery, JJ.), **January 16, 17, February 9, 1940.**]

Clubs—Incorporated members' club—Sale to member—Liquor served to members and honorary members in exchange for money payment—Liquor purchased in club's name as authorised by club committee—Agency—Whether club separate legal entity apart from its members—Whether service of liquor to members a sale—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 65.

The appellant society was registered under the Industrial and Provident Societies Acts, 1893 to 1913, and its objects, as set out in its rules, were to carry on the business of club proprietors by providing for the use of its members, and for such associates of the club as were admitted to honorary membership, the means of social intercourse, mutual helpfulness, mental and moral improvement, rational recreation, and the other advantages of a club. The appellant society was the owner of certain premises which were used as the society's registered office and by the members thereof as the club premises. The society was also registered as a club in pursuance of the provisions of the Licensing (Consolidation) Act, 1910, s. 91. Intoxicating liquors were purchased in the appellant society's name upon the authority of the society's committee, paid for by cheque drawn upon the banking account of the appellant society, and served to members and honorary members of the society in exchange for a money payment. The appellant society was thereupon charged with having unlawfully sold by retail certain intoxicating liquor, the society not then holding an excise licence for the sale of that intoxicating liquor, contrary to sect. 65 of the Act of 1910. On the part of the appellant society, it was contended that, although the society had become a body corporate by registration under the Industrial and Provident Societies Acts, the intoxicating liquors bought on the authority of the committee were bought for consumption by, and were the property of, the members of the society (including the honorary members) as members of a club, that, in so far as the society had any property or interest in such intoxicating liquor, it was as trustee thereof for such members, and that, as there were no shareholders in the society who were not members of the society, the supply of liquor to any of such members was merely a release of the interest of the other members therein, as in the case of a club which was not incorporated. On the part of the respondent, it was contended that the appellant society was a corporate body and a legal entity apart from its members, that in its capacity as a club proprietor it was the owner of the liquor in question, and that the supply thereof to members and honorary members constituted a sale of the intoxicating liquor within the meaning of sect. 65 of the Act of 1910. The stipendiary magistrate upheld the contentions of the respondent and convicted the appellant society. Thereupon this appeal was brought. The facts were similar in the second appeal, except that the company was constituted under the Companies Acts, and was not registered under the Industrial and Provident Societies Acts :—

Held : in the circumstances, the transaction in question was not a sale in the statutory sense, but was rather to be deemed the transfer of a special property in the goods from all the other members of the club to the consumer, in consideration of the price paid. The conviction, therefore, must be quashed.

per Lord Hewart, L.C.J. : what is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club.

[**EDITORIAL NOTE.** It has long been recognised that, in the case of a members' club, the supply of goods of the club to a member is not in law a sale. The member is part-owner of the goods of the club. It was thought that the decision in *Wurzel* v. *Houghton Main Home Delivery Service, Ltd.* (5) aided an opinion which has long been entertained that a distinction might be made where the club was a company, and thus a separate legal entity. The present decision disposes of that opinion, and the position is the same whether or not the club is a company or other incorporated body. In short, the decision in *Newell* v. *Hemingway* (3) is affirmed.

As to Sale to Members of an Incorporated Club, see HALSBURY, Hailsham Edn., Vol. 4, p. 510, para. 946; and for Cases, see DIGEST, Vol. 8, pp. 522, 523, Nos. 109-121.]

Cases referred to:

(1) *Graff* v. *Evans* (1882), 8 Q.B.D. 373; 8 Digest 522, *109*; 51 L.J.M.C. 25; 46 L.T. 347.

(2) *National Sporting Club, Ltd.* v. *Cope* (1900), 82 L.T. 352; 8 Digest 523, *118*.

(3) *Newell* v. *Hemingway* (1888), 58 L.J.M.C. 46; 8 Digest 523, *119*; 60 L.T. 544.

(4) *Bowyer* v. *Percy Supper Club, Ltd.*, [1893] 2 Q.B. 154; 8 Digest 523, *117*; 69 L.T. 447.

(5) *Wurzel* v. *Houghton Main Home Delivery Service, Ltd.*, *Wurzel* v. *Atkinson*, [1937] 1 K.B. 380; [1936] 3 All E.R. 311; Digest Supp.; 106 L.J.K.B. 197; 155 L.T. 575.

(6) *Young* v. *Gentle*, [1915] 2 K.B. 661; 42 Digest 670, *802*; 84 L.J.K.B. 1570; 113 L.T. 322.

(7) *Re Cathcart, Ex p. Campbell* (1870), 5 Ch. App. 703; 42 Digest 669, *795*; 23 L.T. 289.

(8) *Lester* v. *Torrens* (1877), 2 Q.B.D. 403; 30 Digest 99, *750*; 46 L.J.M.C. 280.

(9) *R.* v. *Pelly*, [1897] 2 Q.B. 33; 30 Digest 99, *751*; 66 L.J.Q.B. 519; 76 L.T. 467.

Appeals by way of case stated from decision of the magistrates. The facts are fully set out in the judgment of Lord Hewart, L.C.J.

G. R. Blanco White, K.C., and *A. H. Forbes* for the appellants in the first appeal.

John W. Morris, K.C., and *D. Morgan Evans* for the respondent in the first appeal.

John Charlesworth for the appellants in the second appeal.

H. B. Hylton-Foster (for *W. A. Macfarlane*, on war service) for the respondent in the second appeal.

Lord Hewart, L.C.J. [delivering the judgment of the court]: I will deal first with the case of the first appellants. This is a case stated by a stipendiary magistrate, who convicted the first appellants upon an information charging them with having on Dec. 10, 1938, unlawfully sold by retail certain intoxicating liquor without holding a justices' licence, contrary to the Licensing (Consolidation) Act, 1910, s. 65. The information was laid by the local superintendent of police. The premises upon which the alleged sale took place are used as a genuine working-man's club, and have been so used since Apr., 1922.

The appellants are a society registered under the Industrial and Provident Societies Acts, and the sole object of the society, as appears from r. 1 of the rules, which are the rules of the club and of the society, is to carry on the business of club proprietors by providing for the use of its members:

> . . . the means of social intercourse, mutual helpfulness, mental and moral improvement, rational recreation and the other advantages of a club. A

The membership of the society is identical with the membership of the club. The club was also registered in accordance with the requirements of the Licensing (Consolidation) Act, 1910, s. 91. The other rules of the club show that it is in all respects a members' club. B

Para. 7 of the case states that intoxicating liquors are purchased in the name of the appellant society upon the authority of the committee referred to in r. 17 (5). What is in fact provided by r. 17 is as follows:

> (1) The committee shall control the management of the club. . . . It shall have power to purchase such articles and do all such things as it may deem necessary C for the carrying out of the objects of the club . . . The committee shall not enter into any bond or agreement binding the club to purchase excisable articles from any person or persons or in any way to part with its absolute control and that of the club members over the supply of excisable articles to the club.

The last sentence is taken from the Licensing (Consolidation) Act, 1910, s. 95 (*h*). Failure to comply with this rule would render the club liable D to be struck off the register.

Rule 17 (5) merely provides that the committee or any officer authorised by them shall have power to give orders for such goods to be supplied and work to be done as may be necessary for carrying out the purposes of the club. It would seem, therefore, that it would be more accurate E to say that any purchase of excisable articles for the use of this club was made by the committee on behalf of the members of the club, the committee for that purpose making use of the existence of the appellant society to obtain for the club whatever may be the benefits of registration under the Industrial and Provident Societies Acts. F

Rule 22 of the club rules makes it clear that any profit accruing to the club from the disposal of articles so bought can be used only in the general interest of the members. The question raised by the case is whether or not, in distributing to the members as against cash payments the excisable articles so provided, there was a sale of intoxicating liquor G by retail requiring a licence.

The first general Act dealing with unlawful sales by retail of intoxicating liquor without a justices' licence was the Licensing Act, 1872, which in sect. 3 created the offence now contained in the Licensing (Consolidation) Act, 1910, s. 65, in almost identical terms. Ever since H that date, it has been a matter of general agreement that the transaction which takes places in a members' club, in which the property in the liquor is in all the members equally, when a member orders and pays for intoxicating liquor is not a sale at all in the sense in which that word is used in sect. 3, but is rather to be deemed the transfer of a special property in the goods from all the other members of the club to the consumer, in consideration of the price paid. That aspect of the matter is fully explained in the judgments of FIELD, J., and HUDDLESTON, B., in *Graff* v. *Evans* (1). The club in that case was a *bona fide* members' club, but by r. 7 of the club rules [p. 375]:

> all property acquired by the club shall be vested in the trustees.

No doubt, as FIELD, J., observed in his judgment, this was for the purpose of enabling them to sue or take other legal proceedings with respect to injuries to the possession of the goods belonging to the club. In holding that no sale by retail of intoxicating liquor took place when a member ordered and paid for a drink, FIELD, J., put the matter in this way, at p. 378:

> I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods . . .

In the same case, HUDDLESTON, B., in concurring, says, at p. 379:

> It seems to me clear that Foster had a property or at least an interest in the goods which were transferred to him.

The correctness of that decision has never, so far as we are aware, been doubted. In *National Sporting Club, Ltd.* v. *Cope* (2), CHANNELL, J., said that the case decided that the settled principle that, for a pure members' club, no licence is required is not defeated by the fact that the property is vested in trustees for the purposes of convenience, although the result of such vesting is, as the judge pointed out, that the members of the club have no legal property in the excisable articles. They retain, however, an interest in them, and the obtaining and paying for liquor by the members is treated as a mere distribution of property in which they have a common interest. In our opinion, the decision in *Graff* v. *Evans* (1) applies to, and governs, the present case. Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities which may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquor remains, as in this case it clearly does, in the members of the club. In this connection, there is no magic in the expressions "trustee" or "agent." What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club. We are dealing here with a quasi-criminal case, where the court seeks to deal with the substance of a transaction rather than with the legal form in which it may be clothed.

The precise question raised in this case was decided by a Divisional

Court in *Newell* v. *Hemingway* (3). The facts there were not distinguishable from those in the present case, except that there the company was formed under the provisions of the Companies Acts, and the person who had been convicted, one Newell, was the manager of the club, and, in any event, was not the person who should have been prosecuted. The court consisted of Lord Coleridge, C.J., and Manisty, J. After A a full argument, Lord Coleridge, C.J., held that there had been no transaction in the nature of a sale by anyone. He considered the case covered by the decision in *Graff* v. *Evans* (1), with which he entirely agreed, adding that he would have arrived at the same result had the matter been *res integra*. He further observed that to describe what B had taken place in this members' club as a sale requiring a justices' licence would be to go far beyond what the Act of Parliament was ever intended to do, and would be to put down practices at which the Act was never in the slightest degree aimed. Manisty, J., gave judgment to the same effect. C

From 1888, the date of the decision in *Hemingway's* case (3), the law was regarded as settled, and it has been acted upon ever since. During the last fifty years, many hundreds of *bona fide* members' clubs have become registered under the Companies Acts, or under the Industrial and Provident Societies Acts, upon the faith of the law D as therein declared. So far as we are aware, in regard to none of them has it ever been suggested that it required a justices' licence to cover the serving of intoxicants to members.

Of the other cases to which reference was made, *Bowyer* v. *Percy Supper Club, Ltd.* (4) and *National Sporting Club, Ltd.* v. *Cope* (2) E emphasise the distinction to be drawn between a sale by a third party for his own benefit, for which a licence is required, and a transaction such as that which took place in this case. *Wurzel* v. *Houghton Main Home Delivery Service, Ltd.* (5), which was much relied upon by the respondents, was a case different altogether from the present case. It did not depend F upon the question whether or not a transaction was one of sale. The only question there decided was whether or not a vehicle, owned by an incorporated society whose members consisted exclusively of persons employed at a colliery and which had as its object the business of delivering to its members coal supplied to them from the colliery, was G a vehicle used for the carriage of goods for hire or reward when it delivered coals to a member and payment was made for such delivery. All that was there decided was that, as the incorporated society was a legal entity, and was using the vehicle for the carriage of goods, and was receiving a reward for the hire, the incorporated society was offending H against the words of the Road and Rail Traffic Act, 1933, s. 2 (4). Of the members of the court in that case, only Swift, J., made any reference to *Newell* v. *Hemingway* (3) which expressed any doubt as to the correctness of that decision.

Since 1902, the attention of Parliament has been frequently directed to the question of regulating the distribution of intoxicating liquor in clubs. The Licensing (Consolidation) Act, 1910, itself contains an elaborate code in sects. 91 to 98 in relation to the registration, as distinct from the licensing, of clubs, and it is significant to find that this general consolidating Act, in repealing sect. 3 of the Act of 1872, has re-enacted A it without any material alteration. Even if the court were to take the view that the decision in *Newell* v. *Hemingway* (3) stood upon a less sure foundation than, in our opinion, it does, it would not follow that we should be entitled to regard the matter as *res integra.* We agree with the views expressed by LORD READING, L.C.J., in *Young* v. *Gentle* (6), B when he says, at pp. 668, 669:

> I desire to call attention further to the Licensing Act, 1902, s. 1 (1), because, to my mind, it has a bearing upon the case we are now considering. I refer to the Act of 1902 for the reason that, as expressed by JAMES, L.J., in *Re Cathcart, Ex p. Campbell* (7) [p. 706]: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has C repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them." Now in 1902 the legislature repeated the words which are to be found in the Licensing Act, 1872, s. 12; some words were added, but the material words are repeated almost *ipsissima verba.* Therefore, after the decisions in *Lester* v. *Torrens* (8) and *R.* v. *Pelly* (9), the legislature deliberately used the same language which had received an interpretation not only of a court of competent jurisdiction, but of a court of co-ordinate jurisdiction with this court, and in my view we are not entitled at this date to consider D the question as if it were *res integra.* We must decide it in accordance with the decisions of courts of co-ordinate jurisdiction, which have already dealt with it.

This appeal is accordingly allowed with costs, and the conviction quashed.

I will pass now to the case of the second appellants. In this case, E the appellant company is a company limited by guarantee which has for the last 50 years carried on the business of a club in Sunderland. It was agreed between counsel that the facts in this case are not to be otherwise distinguished from those in the last case, and our decision must be the same. The conviction is, therefore, quashed, and the appeal F allowed with costs.

Appeals allowed with costs.

Solicitors: *Wrentmore & Son*, agents for *Edward T. Davies & Son*, Pontyclun (for the appellants in the first appeal); *Torr & Co.*, agents for *Clifford Walter*, Cardiff (for the respondent in the second appeal); *Vizard,* G *Oldham, Crowder & Cash*, agents for *Wm. Bell & Sons*, Sunderland (for the appellants in the second appeal); *Maude & Tunnicliffe*, agents for *Morton & Morton*, Sunderland (for the respondent in the second appeal).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

H

MIDDLESEX COUNTY COUNCIL *v.* ESSEX COUNTY COUNCIL.

[King's Bench Division (Lord Hewart, L.C.J., Charles and Hilbery, JJ.), **December 19, 1939, February 9, 1940.]**

Poor Law—Settlement—Wife and children deserted by husband—Wife and children in receipt of poor relief—Wife and children on change of residence becoming chargeable to another local authority—Order for removal to former locality—Validity—Maintenance order against husband—Poor Law Act, 1930 (*c.* 17), *ss.* 13, 18, 19 (1), 84 (1), (2), 85 (1), 86 (1), (2), 93 (1) (*f*), (4).

From the date of their marriage, Aug. 22, 1918, to June 27, 1922, a husband and his wife resided in the county of London without interruption, and without receiving poor relief. There were three children of the marriage, none of whom had attained the age of 16 and none of whom was blind or deaf or dumb. From June 28, 1922, to about Apr., 1933, the husband and wife continued to reside in the county of London, but were from time to time in receipt of poor relief. About Apr., 1933, the husband deserted his wife and children, and has since lived apart from them. From about Apr., 1933, to May 25, 1937, the wife resided in the county of London, and was continuously in receipt of poor relief for herself and the children, who all lived with her. On Nov. 17, 1933, upon complaint made by the wife, a maintenance order was made against the husband. On May 25, 1937, the wife and children went to live in the county of Essex, and on the following day they all became chargeable to the county of Essex, and remained so chargeable until Aug. 5, 1937, upon which date an order was made for the removal of the wife and children to the county of Middlesex. From Apr., 1934, onwards, the husband resided in the county of Middlesex without interruption, and without receiving poor relief personally. **The question was whether or not under the Poor Law Act, 1930, s. 18 (*b*),** the relief given to the wife and children after Apr., 1933, the date of desertion, was to be considered as relief given to the husband:—

Held: (i) the relief given to the wife, whose husband was living apart from her, must be considered, by reason of sect. 18 (*b*) of the Act, as given to her, and not as given to the husband, who, therefore, during his residence in Middlesex, had not in law been in receipt of relief.

(ii) the husband had acquired a settlement in Middlesex, and, by virtue of sect. 85 (1), (2), the wife and children took and followed that settlement, and were thus last legally settled in Middlesex.

[EDITORIAL NOTE. The difficulty in the present case is whether relief given to the wife is to be attributed to the husband and so prevent his acquiring a settlement. It is held that, where the parties are living apart, the receipt of relief by the wife will not be so attributed and will not prevent the husband from acquiring a settlement, but, at the same time, the liability of the husband to maintain the wife and that to refund such relief will not be affected.

As to Settlement of Wife, see HALSBURY, Hailsham Edn., Vol. 25, pp. 412, 413, para. 721; and for Cases, see DIGEST, Vol. 37, pp. 242-244, Nos. 336-363.]

Appeal by way of case stated from an order made by two justices acting in and for the county of Essex. The facts are fully set out in the judgment of the court delivered by Hilbery, J.

W. H. Cartwright Sharp, K.C., and *Harold Williams* for the appellants.

R. M. Montgomery, K.C., and *H. W. Wightwick* for the respondents.

Hilbery, J. [delivering the judgment of the court]: By this case stated, the appellants appeal against an order, made on Aug. 5, 1937,

by justices for the county of Essex, for removal of a certain woman with her children to the county of Middlesex. The material facts can be summarised, and they are as follow. On Aug. 22, 1918, Elizabeth Day married John Day. Hereafter, for convenience, they will be referred to as they are in the case as the wife and the husband, respectively. Dorothy,
A Jessie and Raymond Day, hereafter referred to as the children, are children of that marriage. None of these children has attained the age of 16, and none is blind or deaf or dumb. From the date of this marriage until June 27, 1922, the husband and the wife resided in London without interruption, and without receiving poor law relief. From
B June 28, 1922, until about Apr., 1933, the husband and the wife continued to reside in the county of London, but were from time to time in receipt of poor relief. In or about Apr., 1933, the husband deserted the wife and the children, and has ever since lived, and still lives, apart from them. From Apr., 1933, until May 25, 1937, the wife resided
C in the county of London with the children, and was continuously in receipt of poor relief for herself and for the children.

On Nov. 17, 1933, upon complaint made by the wife, a maintenance order was made against the husband by a court of summary jurisdiction sitting at Clerkenwell. On May 25, 1937, the wife went with the children
D to live in the county of Essex, and, on the day following her arrival, she and the children became chargeable to the county of Essex. They remained chargeable until Aug. 5, 1937, when there was made the order for their removal about which complaint is made. From about Apr., 1934, until the date of the case stated herein, the husband resided at
E 20, Douglas Road, Kilburn, and elsewhere in the county of Middlesex, without interruption and without receiving poor relief, unless the relief given to the wife or the children is to be considered as given to him. On Aug. 5, 1937, the order for the removal of the wife and the children to the county of Middlesex was made by two justices of the peace
F acting in and for the county of Essex. On Sept. 9, 1937, the appellants gave notice of appeal against this order of removal, and duly served a statement of the grounds of appeal. Afterwards, by an order of this court, dated Feb. 2, 1939, and by consent of the parties, this case was stated for the opinion of this court.

G It was expressly agreed between the parties (i) that, after being deserted by the husband, the wife had not acquired for herself a settlement by residence, (ii) that the wife takes and follows the settlement of the husband, by virtue of the provisions of the Poor Law Act, 1930, s. 85 (2), and (iii) that the children take and follow the settlement of the husband,
H their father, by virtue of the provisions of sect. 85 (1) of the same Act.

Put shortly, the appellants' contentions were that the order of removal was bad because the husband did not, up to July, 1937, reside for a period of 3 years at 20, Douglas Road, Kilburn, and elsewhere in the county of Middlesex in such manner and in such circumstances as to be settled therein, because the relief given to his wife and children during that time must be considered as given to him, that the husband's last legal settlement by residence was derived from a period of residence, until 1920, for 3 years and upwards at 14, Sidmouth Street, Holborn, and elsewhere in the county of London, and that the wife was a deserted woman, and derived and retained such settlement by residence as her husband had by virtue of his residence as aforesaid in the county of London.

The respondents contended that the husband's residence in the county of Middlesex for a period of 3 years commencing in or about Apr., 1934, was in each of those years such as would, in accordance with sect. 93 (1) of the Act, render him irremovable from the county of Middlesex, that, by reason of the provisions of the Poor Law Act, 1930, s. 18 (*b*), the relief given to the wife and the children after Apr., 1933, when the husband began to live apart from his wife and children, was not to be considered as relief given to the husband, and that the husband, by reason of his residence, acquired a settlement in the county of Middlesex, and was last legally settled therein.

Sect. 18 provides as follows:

> All relief given to or on account of a wife shall be considered as given to her husband, and all relief given to or on account of any child under the age of 16, not being blind or deaf and dumb, shall be considered as given to the father of the child, or to the husband of the mother, or, if the mother of the child is unmarried or a widow, to the mother of the child, as the case may be: Provided that (*a*) nothing in this section shall discharge the father, grandfather, mother or grandmother of any child from liability to relieve and maintain the child in pursuance of the provisions of this Act; and (*b*) where the husband of a woman is beyond the seas, or in legal custody, or in confinement in a licensed house or asylum as a lunatic or idiot, or is living apart from her, all relief given to her or to her child shall, notwithstanding her coverture, be considered as given to her in the same manner and subject to the same conditions as if she were a widow, without prejudice, however, to the liability of her husband in respect of the relief.

The question is, therefore, whether or not, in the circumstances, the husband is to be considered in law as the recipient of the relief given to his wife and children while they were living apart from him. If he is so considered, then he has not acquired a settlement in Middlesex, for, during the whole of the time he has resided at 20, Douglas Road, Kilburn, his wife has been in receipt of poor relief, and the order for removal of his wife and children to Middlesex is bad, and the appeal succeeds.

It will be noticed that sect. 18 begins by providing that relief given to or on account of a wife shall be considered as given to her husband. Those words, one would suppose, are intended, not merely to make the husband liable for the relief given to his wife, but also to make him the recipient of the relief in the eyes of the law. In that case, such disabilities as result from the receipt of relief will attach to him. They will attach to him, not because he has actually received any relief himself, but as a consequence in law of relief being given in fact to his wife. Except for the proviso, his position would be the same if he were living apart from his wife. He would still be considered as the recipient of the relief given to his wife. Sect. 18 (*b*), however, provides as follows:

> . . . where the husband of a woman . . . is living apart from her, all relief given

> to her or to her child shall, notwithstanding her coverture, be considered as given to her in the same manner and subject to the same conditions as if she were a widow without prejudice, however, to the liability of her husband in respect of the relief.

The scheme of that proviso seems to be to draw a distinction between the person who is to be considered the recipient of the relief and the person who, notwithstanding that he is not the recipient in fact or in law, is to be under a liability for it. The relief, the proviso says, is to be considered as given to the wife under the same conditions and exactly as if she were a widow—that is to say, as if her husband were dead, although, *ex hypothesi*, he is alive. The proviso is thus creating an exception, where the wife is living apart from her husband, to the rule just expressed in the section—namely, that relief given to a wife shall be considered as given to the husband. However, while thus providing that, in considering to whom the relief is to be considered in law as given, the husband is to be treated as dead, none the less, as the husband is not in fact dead, the proviso has added to it an express reservation of liability for the relief on the part of the husband. The very fact that this reservation of liability on his part is expressly added goes some way to show that without it the husband would have no such liability, and, if, without it, he would have had no liability, then relief given to his wife when she was living apart from him could not have been considered as given to him. Moreover, in the section itself it is provided that, where the mother of a child is a widow, the relief given her on account of the child shall be considered as given to the mother. That is to say, a widow whose child is relieved shall be considered the person to whom the relief is given. Where, then, the proviso says that relief given to a wife living apart from her husband is to be considered as given in the same manner, and subject to the same conditions, as if she were a widow, one would suppose that it was intended to provide that, in such circumstances, she should be the person considered as the recipient of the relief, and as the one to whom the relief was given, just as when she is in fact a widow she is to be considered the person to whom relief to or for her child is given.

We arrive, therefore, at the conclusion that the relief given to the wife whose husband is living apart from her must be considered, by reason of sect. 18 (*b*), as given to her, and not as given to the husband. The husband, therefore, during his residence in Middlesex, has not in law been in receipt of relief. He has acquired a settlement in Middlesex, and, by virtue of sect. 85 (1), (2), the wife and children take and follow that settlement. The answer to the question asked is that the wife and children are last legally settled in Middlesex. The justices' order for removal made on Aug. 5, 1937, was, therefore, right.

Since, by consent of the parties and by the order of this court, dated Feb. 2, 1939, this special case was stated, and it was agreed between the parties that judgment in conformity with the decision of this court, and for such costs as this court might adjudge, might be entered at the quarter sessions, the judgment of this court will be entered for the respondents. This appeal will be dismissed with costs, and the respondents will enter judgment accordingly at the quarter sessions.

Appeal dismissed with costs.

Solicitors: *C. W. Radcliffe*, Clerk to Middlesex County Council (for the appellants); *Sharpe, Pritchard & Co.*, agents for *E. S. Holcroft*, A Chelmsford, Clerk to Essex County Council (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

B

MAUDE *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Wrottesley, J.), **February 6, 1940.]**

Income Tax—Bank interest—Interest on bank overdraft on account kept at Guernsey—Interest paid to Guernsey branch of bank having its head office in London—Whether interest payable in United Kingdom—Income C *Tax Act,* 1918 (*c.* 40), *s.* 36 (1).

The appellant, a British subject resident in Guernsey, paid interest on an overdraft to the Guernsey branch of a bank having its head office in London. Her income liable to United Kingdom income tax exceeded the amount of the interest, and it was all paid into the Guernsey branch of the bank. At its head office, the bank was assessed, for income D tax, upon profits which included the profits of its branches. The appellant claimed relief under the Income Tax Act, 1918, s. 36 (1), in respect of the sum paid as interest. It was contended on behalf of the respondents that the interest was payable only in Guernsey, and so was not "payable in the United Kingdom" within the meaning of sect. 36 (1):—

Held: in the absence of any special arrangements to the contrary, the appellant could have insisted on paying interest to the bank at its E head office in London. The interest was, in that sense, "payable in the United Kingdom," and the appellant was entitled to the relief claimed.

[**EDITORIAL NOTE.** The point whether this interest was "payable in the United Kingdom" is decided upon a finding that the appellant could have insisted upon paying it at the head office of the bank in London. Of course, as a matter F of practice, it is usual to pay such interest in Guernsey, if it is paid at all, but generally the whole matter is merely a book entry at the local office. The decision is of some importance owing to the amalgamation of banks and the centralisation of banking in London.

As to Income Tax on Bank Interest, see HALSBURY, Hailsham Edn., Vol. 17, p. 334, para. 671; and for Cases, see DIGEST, Vol. 28, pp. 97, 98, Nos. 580-585.] G

Cases referred to:

(1) *Paton* v. *Inland Revenue Comrs.*, [1938] A.C. 341; [1938] 1 All E.R. 786; Digest Supp.; 107 L.J.K.B. 354; 158 L.T. 426; *affg.* S.C. *sub nom. Fenton's Trustee* v. *Inland Revenue Comrs.*, [1936] 2 K.B. 59; [1936] 1 All E.R. 116.

(2) *R.* v. *Lovitt*, [1912] A.C. 212; 8 Digest 423, *25*; 81 L.J.P.C. 140; 105 L.T. 650. H

(3) *Woodland* v. *Fear* (1857), 7 E. & B. 519; 3 Digest 217, *548*; 26 L.J.Q.B. 202; 29 L.T.O.S. 106.

(4) *Prince* v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325; 3 Digest 173, *301*; 47 L.J.P.C. 42; 38 L.T. 41.

(5) *Clare & Co.* v. *Dresdner Bank*, [1915] 2 K.B. 576; 3 Digest 173, *302*; 84 L.J.K.B. 1443; 113 L.T. 93.

(6) *Leader, Plunket & Leader* v. *Direction der Disconto-Gesellschaft* (1914), 31 T.L.R. 83; 13 Digest 432, *1548*; *subsequent proceedings*, [1915] 3 K.B. 154.

(7) *Garnett* v. *McKewan* (1872), L.R. 8 Exch. 10; 3 Digest 222, *574*; 42 L.J.Ex. 1; 27 L.T. 560.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Com-
A missioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The appellant was a British subject resident in Guernsey. In 1936, she arranged with the Guernsey branch of the National Provincial Bank for an overdraft, and in 1937 she paid £133 6*s.* to that branch as interest
B in respect of the overdraft. A portion of the appellant's income liable to United Kingdom income tax was found to exceed the sum of £133 6*s.* The whole of this income was paid into the Guernsey branch of the bank. The head office of the bank was in London, where the bank was assessed to income tax upon profits which included profits
C of its branches. The appellant claimed relief under the Income Tax Act, 1918, s. 36 (1), upon the sum of £133 6*s.* It was contended on behalf of the appellant that she was entitled to repayment of income tax under the Income Tax Act, 1918, s. 36 (1), in respect of the whole of the sum of £133 6*s.* It was contended on behalf of the respondents:

D (*a*) that, in the absence of any evidence to the contrary, it must be assumed that the general law of Guernsey which was relevant—namely, the law of contract—is the same as English law; (*b*) that the interest (on the overdraft) was payable in Guernsey, and not elsewhere, and consequently was not payable in the United Kingdom within the meaning of the Income Tax Act, 1918, s. 36 (1).

The decision of the special commissioners was as follows:

E The sole question for our decision can be stated thus. Is, as Mrs. Maude argued with great force and clarity, the business of the National Provincial Bank indivisibly *one* to the extent of making interest paid to a branch which is not within the United Kingdom, by reason of a contract not made within the United Kingdom, a payment of interest payable in the United Kingdom to a bank carrying on a *bona fide* banking business in the United Kingdom?

It is common ground that the National Provincial Bank is such a bank, and that the business of its branches is its business to the extent at least that the profits
F of the branches, whether within or without the United Kingdom, are part of the profits of the National Provincial Bank. Furthermore, it is an admitted fact that the ultimate control of the business of the branch in Guernsey is with the head office in London.

Argument on these lines is very strong, and it is not without considerable doubt and difficulty that we have come to the conclusion that, for the purposes of this case, we must regard the business of the National Provincial Bank as falling under two
G heads—namely, (i) that part which is carried on in the United Kingdom, and (ii) that part which is carried on not within the United Kingdom, the fruits of which are gathered outside the United Kingdom and subsequently brought within, when they come to swell the business receipts of the bank in London.

The claim, therefore, fails, because the interest is not "payable in the United Kingdom."

Raymond W. Needham, K.C., and *J. S. Scrimgeour* for the appellant.

H *The Attorney-General* (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

WROTTESLEY, J.: Upon the facts of this case, two arguments are put before me by counsel for the appellant. The first one is that, if I look at the Income Tax Act, 1918, s. 36, which governs the terms upon which income tax may be recovered and will be repaid in the light of the Income Tax Act, 1918, All Schedules Rules, rr. 19, 21, and bear in mind the way in which those three statutory provisions all work together to ensure mainly that what he calls the enormity of double taxation shall not occur, I shall really be able to come to the conclusion that, although sect. 36 uses the words "interest payable in the United Kingdom," the stress is not to be laid on the words "in the United Kingdom," and that what I really ought to find out is whether the interest payable is in respect of something which has really already borne tax—as in this case it undoubtedly has, the bank being taxed on the whole of their earnings regardless of whether or not they are earned, so to speak, in London. It occurs to me that, if I were to take that attitude, I should be doing the very thing which GREENE, L.J., in *Fenton's Trustee* v. *Inland Revenue Commissioners* (1), at p. 131, though sorely tempted, suggested it was not right to do, and which, of course, it is not right to do—namely, really so to construe sect. 36 as to leave out the words "in the United Kingdom."

However, that is not the only argument which is put forward here. The other argument put forward is that, properly regarded, the interest which Mrs. Maude owed in respect of her overdraft at the National Provincial Bank's branch in Guernsey is interest which was payable "in the United Kingdom," and, therefore, falls precisely within the terms of sect. 36. This, at any rate, is common ground in this case, though not much is common ground—namely, that, if that be so, she is entitled to succeed here. It has to be borne in mind that the National Provincial Bank lives in London, and, *prima facie*, may there be paid its debts by any person who owes it money. That is *prima facie* the position. It is perfectly true that either the National Provincial Bank itself—by which I mean the headquarters—or any managers of its branches might, in concluding some arrangement or agreement with a customer, insist on payment locally, but nothing of that kind has happened here.

Counsel for the respondents has drawn my attention to two authorities dealing, not with the place at which interest is to be paid to a bank on a loan granted by them, but with the place at which they are to be called upon to cash cheques in respect of accounts which they have opened on behalf of customers, or with or for customers. First there is *R.* v. *Lovitt* (2), where LORD ROBSON, in giving the judgment of the Privy Council, there being there no specific agreement as to where the customer could call for payment by the bank of money deposited with it, pointed out the difficulties which would arise if, in such a case, the customer could go into the branch of the bank or to headquarters and expect the bank to carry out its ordinary liability—namely, to cash cheques or pay over money—inasmuch as it would mean that in that case [p. 218]:

> . . . the bank in London might be called on at any time by a person of whom it

> would probably know nothing, and with only a very limited time in which to obtain the detailed information that would be necessary from the St. Johns branch, to pay $90,351 in London without any deduction for cost of transmission or any agreement as to the rate of exchange.

Then LORD ROBSON went on to say, at p. 219:

> A No such obligation appears by express words or necessary implication in the contract of the parties, and it is very improbable that it was ever contemplated or intended by them . . . Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. Thus, it was held in *Woodland* v. *Fear* (3) that the obligation of a bank to pay the cheques of a customer rested primarily on the branch at which he kept his account, and that the bank in that case had rightfully refused to cash the cheque at another branch. Commenting on that B decision, SIR MONTAGUE SMITH, in delivering the judgment of their Lordships' board in *Prince* v. *Oriental Bank Corpn.* (4), points out that it would be difficult for a bank to carry on its business by means of branches on any other footing, because the officials at one branch do not know the state of a man's account at another branch.

It is clear, therefore, that, in the absence of any express arrangement, C it is not to be implied from the ordinary relations between banker and customer, where a banker keeps the customer's money, that the customer can call for his money to be repaid to him at any branch he likes, and without notice.

A further case which was cited by counsel for the respondents is D *Clare & Co.* v. *Dresdner Bank* (5), which is a decision of ROWLATT, J. That was a case where the plaintiffs, having an account at the Berlin branch of the defendant bank, which had its head office in Germany and a branch in London, wrote to the London branch demanding payment of the balance due on the account of the Berlin branch. Having E been refused that, they sued the bank, without first making a request to the bank at Berlin to pay or remit the balance to London. ROWLATT, J., in that case held that the plaintiffs were not entitled to demand payment from the London branch, and that there had not been any breach by the defendant bank of any obligation to the plaintiffs. He pointed F out, at p. 578:

> As a rule, no doubt, a debtor has to seek out his creditor and pay him; but in the case of a bank with several branches, that cannot be the true relation of the parties. Money has a different value in different parts of the world . . . I cannot conceive it possible that a man who has, we will say, £1,000 sterling to his credit at a bank in New Zealand on coming to London would have the legal right to G demand payment of £1,000 at an office of the same bank in London without being liable to pay anything in consideration of that convenience or even to give time for the bank in London to ascertain whether he was in fact a customer of and had a credit balance at the branch in New Zealand.

In other words, for the customer of the bank to have the right to walk into a branch of the bank and then and there demand payment was H obviously quite impossible and absurd, and a thing which no court could possibly infer from the relationship between them.

It is to be observed that in both those cases the courts were dealing with cases where the man owed money to the bank—it was not the ordinary case of a banker and customer—and were not dealing with the case, as here, of a bank which lends money to a customer. It is to be observed that there was not thought to be, either by the Privy Council in *R.* v. *Lovitt* (2) or by Rowlatt, J., in *Clare & Co.* v. *Dresdner Bank* (5), or in *Leader, Plunket & Leader* v. *Direction der Disconto-Gesellschaft* (6), referred to by Rowlatt, J., in his judgment in *Clare & Co.* v. *Dresdner Bank* (5), any rule by which the banker and the customer had, so to speak, automatically a local character. What was said was that it could not be implied from the relationship between them that there was a liability to pay at any branch.

As has been pointed out by counsel for the appellant in reply, in *Prince* v. *Oriental Bank Corpn.* (4), which was cited in *R.* v. *Lovitt* (2) in the Privy Council, it was pointed out by Sir Montague Smith, at p. 333, that the nature of a branch bank was this, quoting as an instance: *Garnett* v. *McKewan* (7):

> There the plaintiff had accounts at two branches of the London and County Bank. His account at branch A. was in funds; his account at branch B. was over-drawn. He drew a cheque upon his account at branch A. where he had funds, and the bank refused to pay it because his account at branch B. was over-drawn, and the court held it was justified in so doing. The principle of that decision affirms the identity of the bank and its several branches; though separate agencies, the latter were still agencies of one principal bank, with which alone the plaintiff contracted.

It seems to me that, when one comes to consider whether or not Mrs. Maude could have insisted on paying any interest which she owed the National Provincial Bank at their headquarters in London, in the absence of some special arrangement to the contrary, it is clear that she would have been entitled so to do, and that that would have been a perfectly good tender, for which she could have insisted on getting a proper receipt.

That being the position, it seems to me to dispose of this case, because, in the absence of some special provision to the contrary, of which there is no trace—because we have all the evidence, and no special arrangement was made, we are told, and the document which is now produced makes no reference to it one way or the other—it seems to me quite impossible to conclude from the facts here that the bank could have refused to accept this interest except at the Guernsey branch. It seems to me quite clear that they would have had to accept this interest on its being tendered at their London headquarters. That being so, it seems to me that it was interest which was, in that sense, "payable in the United Kingdom," and it was there payable if Mrs. Maude chose to pay it there, and that is, within the meaning of sect. 36 of the Act, "interest payable in the United Kingdom." The appeal, therefore, must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Wood, Nash & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

SMITH *v.* MOSS AND ANOTHER.

[King's Bench Division (Charles, J.), **December 12, 1939.**]

Husband and Wife—Action by wife for tort of husband—Tort committed by husband as agent of third party—Action against third party.

Mrs. R. was the owner of a car, but was unable to drive it. Her son drove it for her, as the judge found, as her agent. The car was garaged at the son's house. On Jan. 1, 1938, the son drove his mother and his wife home from a party, and, having set his mother down at her house, was driving the car to the garage at his own house, his wife being a passenger in the car. On the way, an accident occurred by reason of the son's negligence, and the wife was injured. The wife sued the mother for damages for personal injuries, and it was pleaded in defence that the wife could not recover in respect of her husband's negligence :—

Held : at the time of the accident, the husband was acting as the agent of his mother, and the wife was entitled to recover.

[**EDITORIAL NOTE.** The decision herein sets a limit upon the principle that a wife cannot recover in respect of her husband's tort. Where the tort—in this case, negligence—is committed as the agent of a third person, the negligence is, in law, that of the third person, and a wife is entitled to succeed in an action against the third party.

As to Actions in respect of the Tort of the Other Spouse, see HALSBURY, Hailsham Edn., Vol. 16, pp. 739, 740, para. 1210 ; and for Cases, see DIGEST, Vol. 27, pp. 259, 260, Nos. 2288-2295.]

Action for damages for personal injuries. The facts are fully set out in the judgment and the case is only reported so far as the claim against Mrs. R. Smith is concerned.

F. G. Paterson for the plaintiff.

Humfrey H. Edmunds for the first defendant.

S. R. Edgedale for the second defendant.

Charles, J.: In this case, Ida Ethel Smith, the wife of Leslie Alfred Smith, makes a claim against a gentleman named Moss, and also, by amendment, against Rosalie Smith, her mother-in-law.

Mrs. Rosalie Smith bought a car. She thus became the registered owner of the car, and, until she sold her house with a garage under it to her son, Leslie Alfred Smith, she garaged the car in her own garage. After that sale, she still garaged it in the same garage, the son making no charge. She paid for all the running repairs, the licence fee and the insurance, but, whenever she wanted to use the car, the son, and he alone, was the person who was allowed to drive it. No one else was the driver of the car. If it had not been for him, it would have been immobile, for she had no one else to drive it. It is clear that, when he was so driving the car, he was driving as her agent. When the son desired to take the car out on his own business, he did so, and it might be argued that on those occasions he certainly was not acting as the agent of his mother.

At 3 a.m. on Jan. 1, 1938, the car was being used to convey the mother, the son and his wife home from a party, and the son was driving.

The mother was taken to her house, and, as the car could not be left outside that house for the night, the son had to drive it to the garage, which was at his own home. I find that, when so driving, he was acting as an agent. On the way to the garage, the son drove the car towards certain crossroads at much too high a speed and collided with another car, his wife being injured and receiving a nasty shock. It is said A
that, although the son was, as I have held, acting as the agent of his mother, the wife cannot recover damages in respect of her injuries against the mother-in-law, because the accident was caused by the negligence of her husband (for so I find) and a husband can commit no tort against his wife. I cannot conceive, however, that the mere B
fact that he is acting as an agent for someone else, and, while acting as such agent, happens to commit a tort, such as negligence in the driving of a motor car in which his wife is a passenger, deprives his wife of her rights against his employer—that is to say, the wife's mother-in-law. It is true she paid no wages, but she was a person who was using him as C
her agent to drive the car.

If one takes it to the extreme, supposing that this lady were in the habit of hiring her car from, we will say, James & Co., and supposing that James & Co. happened to employ the husband, out of many dozens of drivers in a big concern, and supposing that on a certain day the D
wife telephoned to James & Co. and said, "I want a car to take me to the station," and her husband happened to be the driver of that particular car, then, if there was an accident on the way to the station, I do not think that it could be said that she would be deprived of her rights against James & Co. merely because the active operator in this tort was the E
husband. He has two persons, one as husband and one as agent. In this case, I think that he was acting as the agent of his mother. He was the only man whom she ever had to drive the car, and on this night he had been driving her, the registered owner. Without him she would not have got to her party, and without him she would not have got F
back from her party. It was by her direction that he took her to the party, and it was by her direction that he took her back from the party. It was while he was on his way back to the garage that the accident happened, and, in my judgment, he had not then ceased to be acting for her. That being so, the plaintiff succeeds in law against Mrs. G
Rosalie Smith.

Judgment for the plaintiff for £150 *against the second defendant with costs.*

Solicitors: *Darracotts* (for the plaintiff); *R. I. Lewis & Co.* (for the first defendant); *William Charles Crocker* (for the second defendant).

H

[*Reported by* A. GRIMBLE, ESQ., *Barrister-at-Law.*]

McQUAKER *v.* GODDARD.

[COURT OF APPEAL (Scott, MacKinnon and Clauson, L.JJ.), **February 7, 8, 1940.**]

Animals—Liability of owner—Domesticated animals—Animal not known in wild state—Camel—Onus of proof of vicious propensity—Functions of judge and jury.

The appellant, while visiting a zoo owned by the respondent, had his hand bitten by a camel which he was in the act of feeding. The camel was in a field fenced in with wire-netting some 6 ft. high. The appellant sued the respondent for damages, and contended (i) that the camel had a propensity, known to the respondent, to attack mankind, and (ii) that the camel was, at any rate in England, a wild animal disposed to attack mankind, and that the respondent was, therefore, absolutely liable for any damage which it did. It was also contended that the respondent had been guilty of negligence in that the fence around the enclosure was not sufficiently high or solid to prevent the camel from putting its head over and so reaching people standing nearby:—

HELD: (i) there was no evidence that the respondent knew that this camel had a propensity to bite.

(ii) it is the function of the judge and not of the jury to decide whether an animal belongs to the class of domestic animals or to the class of wild animals. In this case, the judge had rightly decided that a camel must be regarded as a domestic animal.

(iii) the respondent had not been guilty of negligence. As he had no knowledge that the camel might put its head over the fence and bite someone, he was not under any duty to have a more effective fence.

[**EDITORIAL NOTE.** It is said in this case that nowhere in the world is the camel found as a wild animal. Most domestic animals are also found somewhere in the world in the wild state. The camel is, therefore, a domestic animal, unless the law applies a different rule to animals brought from their native land and kept in captivity in a strange country. This suggestion the Court of Appeal has refused to entertain.

AS TO INJURIES CAUSED BY ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 539, 540, para. 929; and FOR CASES, see DIGEST, Vol. 2, pp. 236-241, Nos. 238-258.]

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

(2) *Aldham* v. *United Dairies (London), Ltd.*, [1939] 4 All E.R. 522; Digest Supp.

(3) *Mason* v. *Keeling* (1699), 1 Ld. Raym. 606; 2 Digest 243, *274*.

(4) *Filburn* v. *People's Palace & Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 2 Digest 238, *243*; 59 L.J.Q.B. 471.

(5) *May* v. *Burdett* (1846), 9 Q.B. 101; 2 Digest 237, *240*; 16 L.J.Q.B. 64; 7 L.T.O.S. 253.

(6) *Osborne (Osborn)* v. *Chocqueel*, [1896] 2 Q.B. 109; 2 Digest 245, *288*; 65 L.J.Q.B. 534; 74 L.T. 786.

(7) *Nada Shah* v. *Sleeman* (1917), 19 W.A.L.R. 119; Digest Supp.

APPEAL by the plaintiff from the verdict and judgment at the trial by Branson, J., and a common jury at Kingston Assizes on July 6, 1939.

Harold J. Brown for the appellant.

Eric Neve, K.C., and *A. A. Pereira* for the respondent.

Brown : An animal may be domestic in its native sphere and yet not domestic if taken abroad. Even if camels are domestic animals in A their native sphere, they may have to be treated as wild if they are brought to this country. It is necessary to give a meaning to the word "domestic." It may mean domestic in the English colloquial sense, and need not necessarily mean domestic in the sense of being of service to mankind throughout the whole world. In the present case, B Branson, J., has taken the subjection of the animal to man as the test. In other words, the camel is nowhere found out of captivity. *May* v. *Burdett* (5) had reference to a monkey, and the decision in that case was the basis of the decision in *Filburn* v. *People's Palace & Aquarium Co., Ltd.* (4), where the Court of Appeal, without any evidence C on the point, held that an elephant must be regarded by the law of this country as a wild animal. In the present case, the matter is a point of law for the court, and evidence upon the point is immaterial. The court should ignore the evidence given on this part of the case, and should base its decision upon the ordinary knowledge of animal life D which we all have, as was done by the Court of Appeal in *Filburn* v. *People's Palace & Aquarium Co., Ltd.* (4). In this country, an animal must be held to be a wild animal until it has gained a reputation for harmlessness. [Scott, L.J., referred to *Osborne* (*Osborn*) v. *Chocqueel* (6).] *Aldham* v. *United Dairies* (*London*), *Ltd.* (2) is ground E for the proposition that, if an animal bites a person, the animal must be *feræ naturæ*, or there must have been negligence. In that case, there was no evidence of *scienter*. In *Nada Shah* v. *Sleeman* (7), the opinion was expressed that the camel would be held to be a wild animal in England. Although that opinion is not binding on this court, it is the F only expression of judicial opinion I am able to cite. [Counsel referred to Halsbury's Laws of England, Hailsham Edn., Vol. 1, p. 539.]

Neve, K.C. : Whether or not the camel is a domestic animal was a question for the judge to decide on the facts placed before him. It must be a question of law, based upon the facts which were proved. It was G proved that the camel is a domestic animal. No one can regard the camel as being *feræ naturæ*. The finding of the judge on that part of the case is a finding of fact, and it is a finding which ought to remain undisturbed. It was for the judge to determine, upon the facts, whether or not the camel was a domestic animal. That is a determination of law, H but it is a determination based upon the evidence which was called before him. Counsel for the appellant says that a third class of animal should be added to the two classes into which animals were divided by Lord Esher, M.R., in *Filburn* v. *People's Palace & Aquarium Co., Ltd.* (4). That third class has never found its way into English law at all. Once it has been established that an animal is in the class of domestic animals, the natural inference is that it is not a dangerous animal. [CLAUSON, L.J., referred to *Mason* v. *Keeling* (3).]

SCOTT, L.J.: This case has been very well argued by counsel for
A the appellant, and is a case of general interest. It is also one in which the court joins with the judge in the court below in expressing sympathy for the plaintiff, in that, as the law stands, he is not entitled to any remedy in respect of the serious injuries which he received. In expressing that sympathy, I, at any rate, do not desire to imply any sense
B of blame in any respect against the defendant, who was the owner of zoological gardens at Chessington.

In Aug., 1938, the plaintiff went with a lady to see this zoo. They took a picnic lunch with them, and were sitting on the lawn next to a camel's enclosure, a piece of field fenced in with wire-netting some 6 ft.
C high, inside which there was an Arabian camel. Some children, who were also picnicking, with their parents, were on the same lawn. After they had had their picnic lunch, and after the plaintiff had had his, the children started giving apples, or other food, to the camel, which ate them with pleasure, and without doing any harm. The plaintiff
D then thought that he would do the same thing, and he offered an apple to the camel. Unfortunately, in a way which he described, the camel, instead of taking the apple from his hand, caught hold of his hand. Having got his hand, which was not an apple, as the camel had expected, the camel bit and crushed the plaintiff's hand very seriously.
E The plaintiff himself thinks that he was lifted off the ground by the camel and shaken. That may or may not be so. I express no opinion about that, because it is quite clear that the injury done to the unfortunate man's hand was very serious, and it may be that his recollection of those exact incidents is not strictly accurate. Be that as it may,
F it was a serious injury. He subsequently brought an action against the owner of the zoo to recover damages for the injury he had suffered.

He put his case in his amended statement of claim on two alternative grounds—namely, (i) the usual form of action against the owner or keeper of an animal, where the plaintiff succeeds in showing that a
G propensity to bite or otherwise attack mankind was known to the defendant, or (ii) on the ground that the camel is a wild animal—at any rate, in England—and that English law holds the owner or keeper of a wild animal of a disposition to attack mankind as being under an absolute duty to prevent that animal from attacking anybody, the breach
H of which results in a liability in damages, without any proof of knowledge of the propensity on the part of the animal, and without any proof of negligence. Another ground put forward in the statement of claim was that, even if a camel is properly to be regarded as a domestic animal in respect of which knowledge of a propensity to bite or injure mankind is essential, and even if the plaintiff could not prove what is known as

scienter, or knowledge of that propensity, yet, on the facts of the case, the defendant was guilty of negligence in that the fence was not high enough or solid enough to prevent the camel from putting his head over it, and pressing down the wire in such a way as to be able to reach people who were standing on the lawn. Those were the issues raised by the statement of claim, and they were met by traverses on the part A
of the defendant, including a point of which we have heard nothing in this court—namely, that the plaintiff took the risk voluntarily upon himself. That we can disregard. Shortly, those are the facts, and, I think, all the facts which are material for the consideration of the issues which arose between the parties. B

The plaintiff called witnesses to prove that all camels have a tendency to bite—that is to say, that they are treacherous, and may bite at any time—but it was not very strong evidence, and it was not as strong as the evidence of the two witnesses called on behalf of the defendant. One, in particular, was a man who had had long experience over many C
years in dealing with camels as transport animals, and he spoke to their being obviously domestic animals, and being free from vice, just as free as many animals of the domestic kind in England, such as bulls or stallions, or some dogs. The chief witness called for the defendant, however, was a man who had been a keeper of camels at the Zoological D
Gardens in Regent's Park for a very great number of years. He spoke to the nature of camels as he got to know them there, and, spoke, no doubt, with other knowledge about camels of an expert kind, and said that this idea that camels have a natural tendency to bite human beings is not true. He proved, among other things, that at the Regent's Park E
Zoological Gardens the camels are kept behind iron railings. It is true that they were 6 ft. high, but they were 6 ins. apart, so that it was quite easy for people to put their hands through and feed the camels, and the keeper had never known of a case of biting.

Broadly, those are the results of the evidence on the two sides, with F
one qualification. It was quite clearly established by the defendant's witnesses, in my view, that camels do not exist anywhere in the world to-day, and did not exist in 1938, as wild animals. There is no race of wild camels which can be captured and tamed as elephants can be. Wild elephants do exist in the world, both in Asia and in Africa, in G
great numbers. Though they can be tamed, and can be taught to be extremely clever, as, for instance, in the teak forests of Burma and in India, wild elephants are apt to be savage, and to attack human beings in certain circumstances. Camels, on the other hand, are nowhere in the world to be found in the wild state. In every country in the world H
where camels exist, they are domestic animals used for carrying either people or loads, or for draught purposes.

There was no evidence given in this case that the defendant had any knowledge that this camel was vicious. Nor, indeed, was there any evidence to the effect that this camel was vicious as distinct from camels as a class. Nor was there any evidence given for the plaintiff that the defendant had any knowledge at all of any propensity of camels to bite. If the evidence of the camel-keeper from the zoo is to be accepted, and if the evidence of the other witness called for the defendant is to be accepted, that propensity to bite was very much exaggerated A by the plaintiff's witnesses. In addition to that, the plaintiff's witnesses had nothing like the same experience or means of knowledge to constitute really valuable expert witnesses about camels as the defendant's witnesses had.

On the question of law, it is important to bear in mind that, in the B old common law of England, a rule was laid down long ago that domestic animals are regarded in quite a different light from wild animals. Wild animals are assumed to be dangerous to human beings because they have not been domesticated. The law does not assume domestic animals to be dangerous. That is the reason why, in English law, a keeper of a C wild animal must keep it in at his peril. If he lets it out and it causes damage to any human being personally, or to the property of another, the keeper or owner of the animal, as the case may be, is liable in damages for the injury so caused.

On the other hand, in the case of domestic animals, the presumption D of law is the other way. The plaintiff has to prove that the defendant was aware of the particular propensity of the animal to hurt human beings which was evinced in the case where, *ex hypothesi*, the plaintiff suffered. Unless the plaintiff proves that knowledge, at common law there is no liability upon the defendant. That liability has, in the case E of dogs worrying sheep and in the case of certain other animals, been altered by legislation in Parliament. Apart from those exceptional statutory cases, however, there is no liability without proof of knowledge on the part of the defendant, or, as it is called in law, *scienter*.

In the present case, it was argued strongly on behalf of the appellant F that the camel stands in a different category from that of ordinary English domestic animals, because it has not become a domestic animal in England. In my view, that argument is fallacious. If an animal does not exist in a wild state in any part of the world, it has ceased altogether to be a wild animal, whether it is in England or in any other G country. It is a domestic animal, and an animal which has become trained to the uses of man, and, *ex hypothesi*, become accustomed to association with man. Therefore, in my opinion, that argument falls to the ground altogether. With regard to that argument, it is also well to remember that it is the function of the judge, and not of the jury, H to decide whether an animal belongs to the class of domestic animals or to the class of wild animals. I need say no more for the moment on this head. I think that CLAUSON, L.J., will probably add a few words on that aspect of the case. It is enough, for the purposes of my judgment, to say that in this case the judge decided—and, in my view, rightly decided—that the camel must be regarded as a domestic animal.

If that is so, then the cause of action which the plaintiff had was not on the higher basis of absolute duty which rests upon the keeper of a wild animal, as in the case of a man who brings on his land any foreign matter or animal likely to escape and do damage, which is part of the law of this country as laid down by the House of Lords in *Rylands* v. *Fletcher* (1). His only course is either to prove the knowledge of this defendant of the propensity to bite on the part of this camel—I keep open a possibility of a general propensity to bite in all camels, which may be expected, or ought to be expected, in any camel—or, on the other hand, to establish a case of negligence. I deal with the first aspect left to him in the first instance. There was no evidence at all in the case that, at the time the plaintiff was unfortunately injured, the defendant had any knowledge that this camel had a propensity to bite people. Also, there was no evidence given by any witness that he had knowledge of a propensity of most camels, or of many camels, to bite. On the second point, however, counsel for the appellant submitted to the court that, as the defendant was a keeper of zoological gardens, the court ought to presume that he had expert knowledge of the habits and nature of all camels as a species. In my view, it is not necessary to do more than say that, on the facts of this case, as proved by the evidence, there was no such propensity established in fact as would bring into operation any such presumption, even if in law it exists. There was evidence, no doubt, that some camels did bite, and that there was a risk that any camel might bite. That was the evidence given by the plaintiff's witnesses. The evidence of the defendant's witnesses, however, was very much stronger than that of the plaintiff's on that point. In my view, the question of the character of a particular species of animal and the question whether or not it is a wild animal being an issue to be decided by the judge, it may be that, where the question is whether or not a particular class of domestic animal, such as a camel, is alleged to have a general propensity to bite, that issue is also one which should be decided by the judge. I assume several points of law in favour of the plaintiff's argument in making those observations. In my view, however, it is not necessary for the court to decide any of them. It is clear that there was no evidence of knowledge on the part of the defendant that this camel had a propensity to bite, and there was no evidence that it had such a propensity. In my view, the plaintiff's own evidence, disregarding the defendant's evidence altogether, did not amount to evidence of such a general propensity as would justify the proposition submitted by counsel for the appellant, even if it were valid, that this defendant, keeping an animal of that class, ought to be presumed, where he has a zoological gardens where he keeps the animal, to have such knowledge as would raise that presumption. That being so, in my opinion, the plaintiff made no *prima facie* case on that alleged ground, any more than on the ground that this particular camel had a vicious propensity, or that the defendant knew of that vicious propensity. Consequently, in my judgment, the judge was right in not leaving the issue on that part of the statement of claim to the jury. He rightly decided that there was no case made by the plaintiff to go to the jury on either of those two contentions. In saying that, I assume that counsel for the appellant A made the wider case plain to the judge, though I am not sure that he did. In dealing with it, however, I have given him the benefit of the doubt.

The other aspect of the case was that of negligence. The way in which the plaintiff put it was this. He contended that the defendant B ought to have known that it was dangerous to have so flimsy and ineffective a fence as this wire-netting fence within which the camel was kept. As I put it to counsel for the appellant in argument, however, that submission really rests upon the unproved assumption that the defendant knew that there was a danger that the camel might put its head over C the fence, press down the fence, and bite somebody. If the defendant had not that knowledge, there was nothing to give rise to any duty on his part to have a more effective fence.

This case differs wholly from *Aldham* v. *United Dairies* (*London*), *Ltd.* (2). MACKINNON, L.J., was a party to that decision, and I leave D it to him to make any observations he feels disposed to make upon that case. That, however, was a case where there was independent evidence of negligence, apart from any knowledge of a propensity on the part of the pony which did the damage in that case to cause injury to mankind. For that reason, in my view, that authority has no bearing E at all upon the present case. That final conclusion leads me to the general conclusion that the judge's judgment in this case was wholly right, and is open to no attack at all. The various cases on the law as to dangerous animals were considered by us, but the law is so well-known that I do not think it necessary to refer to them. The appeal must be F dismissed with costs.

MACKINNON, L.J.: I agree. The law upon this topic has been settled for a very long while. The leading cases begin with *Mason* v. *Keeling* (3), a decision of HOLT, C.J., in 1699. The principle has nowhere G been better laid down than in the judgment of BOWEN, L.J., in *Filburn* v. *People's Palace & Aquarium Co., Ltd.* (4), at p. 261:

> The broad principle that governs this case is that laid down in *Rylands* v. *Fletcher* (1), that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mis- H chievous animals is a branch of that law which has been applied in the same way from the times of LORD HOLT and of HALE until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief.

This is a case of an animal—namely, a camel—having done harm to the plaintiff, and the plaintiff sues the defendant. The question of the defendant's liability depends primarily upon the question into which of the two classes of animals specified by BOWEN, L.J., the camel comes. Is it of a class of wild animal of which individuals may be tamed, or is it of the other class, tame animals, *mansuetæ naturæ*, which notoriously may sometimes develop vicious habits? If it is in the second class, then, in order to establish the defendant's liability, the plaintiff must prove that the defendant knew that the particular animal kept was likely to do mischief. The judge has held, upon overwhelming evidence, that the camel is within the class of tame animals, and not within the class of wild animals. The evidence was overwhelming that in fact camels are the oldest domesticated animals in the world.

That being so, though a particular camel may have vicious tendencies, as dogs or even cattle may have vicious tendencies, the defendant is not liable unless the plaintiff proves that the defendant knew that this particular animal was likely to do mischief. There being no evidence to that effect, the plaintiff fails to prove what is the essential element in his cause of action against the defendant, and the judge rightly gave judgment for the defendant. I agree that the appeal should be dismissed. I was rather invited by SCOTT, L.J., to say something about *Aldham* v. *United Dairies* (*London*), *Ltd.* (2), but that was so totally different a case that I do not think it necessary to do so.

CLAUSON, L.J.: I agree. I should be content to say that I can find no flaw in the judgment of the judge in the court below, but I should like to add just a word as to the part taken in the matter by the evidence given as to the facts of nature in regard to camels. That evidence is not, it must be understood, in the ordinary sense evidence bearing upon an issue of fact. In my view, the exact position is this. The judge takes judicial notice of the ordinary course of nature, and, in this particular case, of the ordinary course of nature in regard to the position of camels, among other animals. The reason why the evidence was given was so that it might assist the judge in forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge.

The point is best explained by reading a few lines from STEPHENS' DIGEST OF THE LAW OF EVIDENCE, art. 62:

> No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.

After all, the document or book of reference only enshrines the knowledge of those who are acquainted with those particular branches of natural phenomena, and, in this particular case, owing to some extent to the fact that there appears to be a serious flaw in a statement in a well-known book of reference on the matter here in question, the judge thought fit to permit, and properly to permit, oral evidence to be given before him by persons who had, or professed to have, special knowledge with regard to this particular branch of natural history. When that evidence was given, and when it was weighed with the statements in the books of reference which were referred to, the facts became perfectly plain, and the judge was able without any difficulty whatever to give a correct statement of the natural phenomena material to the matter in question, of which he was bound to take judicial notice. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Gordon Gardiner, Kearton & Co.* (for the appellant); *Watson, Sons & Room* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BRITISH INDUSTRIAL PLASTICS, LTD., AND OTHERS *v.* FERGUSON AND OTHERS.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **January 16, 17, 18, February 8, 1940.**]

Master and Servant—Secret process—Leaving agreement—Disclosure to patent agent—Patentability—Inducement of breach of agreement—Justification—Conspiracy.

Tort—Inducing party to break contract—Bona fide acts.

The defendant D. had been employed by the plaintiffs for many years. In 1932, he left their employ, and thereafter entered into a leaving agreement with them whereby he undertook, *inter alia*, until Mar. 31, 1934, not to interest himself directly or indirectly in the manufacture or sale of certain chemicals which were used in a secret process of the plaintiffs. In June, 1934, D. approached the defendant company and suggested that he had a process of his own which might be of use to them. They sent him to their patent agents, who, after investigation, reported that the process was patentable, and in due course application was made for a patent. The plaintiffs commenced an action against D., the defendant company, and F., its managing director. The claim against D. was for damages for breach of contract, that against the defendant company and F. was for damages for inducing the breach of contract, and that against all the defendants was for damages for conspiracy. It was found that the defendant company had acted honestly, but in a muddle-headed way, and that, though, when the defendant D. first approached them, they suspected that his process might have been secret and the plaintiffs' property, they were under the impression that, if this process were patentable, it could not be secret:—

HELD: (i) as there was no evidence that the defendant company had actual or constructive knowledge that the process disclosed was the process of the plaintiffs, there was no ground of action.

(ii) if the defendant company had induced D. to reveal the process to their patent agents, it could not be held that patent agents, in giving advice, filled the character of agents in law.

Order of Court of Appeal ([1938] 4 All E.R. 504) *affirmed.*

[**EDITORIAL NOTE.** Where a contractual relationship exists between parties, it is a tort for anyone wrongfully to induce one of the parties to break the contract so as to cause damage. There is a right of action whether or not specific damage has accrued. The word "wrongfully" in such a case is here construed to mean knowingly rather than maliciously. It would seem to be sufficient that a party should act *bona fide* in the matter, and he will not be liable to an action by reason of the fact that he has acted mistakenly, so long as it cannot be said that he was wilfully A
shutting his eyes and excluding a means of knowledge. Thus, where a party suspects that there is a possibility that an act of his will in effect induce a breach of contract, and he adopts means of testing that possibility which he honestly believes to be a proper test, he does not render himself liable to an action because he is mistaken as to the efficacy of that test.

As to Inducing Breach of Contract, see HALSBURY, Hailsham Edn., Vol. 32, B
pp. 172, 173, para. 248; and for Cases, see DIGEST, Vol. 42, pp. 986-990, Nos. 167-194.]

Appeal by the plaintiffs from an order of the Court of Appeal (Slesser, MacKinnon and Finlay, L.JJ.), dated Nov. 24, 1938, and reported [1938] 4 All E.R. 504, affirming an order of Porter, J., dated C
Feb. 14, 1938. The facts and the arguments are fully set out in the opinions of Lord Russell of Killowen and Lord Romer.

Rt. Hon. Sir William Jowitt, K.C., K. E. Shelley, K.C., and *Guy T. Aldous* for the appellants.

A. T. Miller, K.C., and *James Mould* for the respondents. D

Lord Atkin: My Lords, I have had the opportunity of reading in advance the opinion about to be delivered by my noble and learned friend Lord Russell of Killowen. I entirely agree with it, and I have nothing to add. E

Lord Thankerton: My Lords, I have had the privilege of reading the opinions about to be delivered by my noble and learned friends Lord Russell of Killowen and Lord Romer, and I desire to express my concurrence in both of them. F

Lord Russell of Killowen: My Lords, the facts and events which led up to this litigation are fully stated in the judgment of Porter, J., and I do not propose to refer to them further than is necessary to make plain the reasons why I agree with the Court of Appeal in G
thinking that the order made in pursuance of that judgment should stand. The effect of the judgment and order was that judgment was entered (i) for the defendants John Edward Ferguson and James Ferguson and Sons, Ltd., with costs, and (ii) for the plaintiffs against the defendant Doherty for £15,000 with costs. There was no appeal by the H
defendant Doherty, but the plaintiffs appealed and asked that the defendant Ferguson and the limited company be ordered to pay to them the sum of £15,000 by way of damages, and the costs of the trial and appeal. That appeal was dismissed with costs, and the plaintiffs have now appealed to your Lordships' House.

The claim of the plaintiffs (I treat them as one) against the respondents is based upon an allegation that they wrongfully and maliciously induced and procured the defendant Doherty to commit breaches of his agreements of service with his former employers (the plaintiffs) by disclosing to the respondents information relating to the processes used by the
A plaintiffs, which information to their knowledge was secret and confidential, and the exclusive property of the plaintiffs. That allegation, if proved to the satisfaction of the trial judge, undoubtedly discloses and establishes a good cause of action, which would entitle the plaintiffs to recover damages against the respondents. The judge was satisfied
B that all but one of the essential ingredients of the cause of action had been proved. What, in his view, had not been proved was the essential ingredient of knowledge on the part of the respondents—that is, knowledge that the process disclosed by Doherty was not his property, but the property of his former employers.

C Let me state shortly how, as I read his judgment, the judge reached this conclusion. He thought, as a result of all the evidence relating to the interview of June 27, 1934, (i) that Ferguson and his co-director Welch suspected that the process which Doherty said was his own property might (since Doherty's knowledge was in the main derived
D from his experience at the plaintiffs' works) be the plaintiffs' process, or part of it, (ii) that, frightened by their recollection of the results of their recent dishonesty in regard to the Bakelite secret process, they declined to hear any description of the process until they were satisfied that the process was truly the property of Doherty and of
E no one else, (iii) that they muddle-headedly and illogically, but in fact, believed that, if patent agents found the process to be patentable, that would establish definitely that the process belonged to Doherty, and to no one else, (iv) that they sent Doherty to Messrs. Haseltine, Lake & Co., in order to make sure, before any disclosure was made
F to them (the respondents), that the process was the property of Doherty, and of no one else, and (v) that, since Messrs. Haseltine, Lake & Co. did find the process to be patentable, the respondents had no knowledge, when they induced the disclosure to themselves, that the process was the property of the plaintiffs.

G My Lords, if there was evidence to support those conclusions of the judge, this appears to me to be essentially a case in which we should be slow to take a different view from that of the person who had the overriding advantage of seeing and hearing the witnesses, and observing their demeanour in the witness-box. In my opinion, there was, without
H doubt, evidence upon which the trial judge could properly acquit those through whom the limited company acted of acting with a fraudulent mind, and upon which he could properly make the following findings as to the state of mind and beliefs of Ferguson and Welch, which I cite from his judgment:

> It did not occur to them that Doherty could be making a false claim, or that

> he might be revealing his employers' secrets, provided that, before the revelation, they had been assured that he had something which could be the subject of a patent. To them, that fact was decisive of the question whether or not they were obtaining the plaintiffs' secrets. . . . they thought . . . that the process, once found to be patentable, would be proved not to be secret. . . . I think . . . that their refusal to have the process disclosed then was because they were suspicious, and wished to know whether or not their suspicions were justified, and that they referred the matter to their patent agents in the belief—illogical but actual—that, if those agents found the process patentable, their suspicions would be proved to be unfounded, and the process neither secret nor confidential. A

When the judge uses the words " proved not to be secret " and " proved to be . . . neither secret nor confidential," he obviously means proved not to belong to anyone but Doherty.

Great reliance was placed by the appellants upon the fact that B Porter, J., expressed the view that, if Ferguson and Welch had induced Doherty to disclose the process at the interview of June 27, 1934, they would have been liable, because of their suspicion that what he was going to disclose was the property of his former employers. Whether or not this would be so must, I should think, depend upon how far, C in all the circumstances of the case, the " suspicion " approximated, or was equivalent, to knowledge. In view, however, of the judge's other findings, and of what in fact happened, this hypothetical finding of liability is, upon this part of the case, of minor importance.

My Lords, feeling myself not justified in differing from the con- D clusions on the evidence which were reached by Porter, J., and which I have set out above, I think that the appeal must fail so far as regards the only disclosure pleaded—namely, disclosure to the respondents themselves. As pleaded, it would seem, from the particulars, that the disclosure to the respondents which was relied upon was the disclosure E to the world at large by the acceptance of the complete specification, whereas disclosure to the respondents in fact took place immediately after the lodging of the provisional specification. However, which is the relevant date is, for this purpose, immaterial, because, upon the findings of the judge, before either disclosure took place, the proof, F which to the respondents was decisive as to Doherty's ownership of the process, had already been forthcoming. The plaintiffs, however, contended that they were entitled to succeed on this appeal on the ground of the disclosure made by Doherty to Messrs. Haseltine, Lake & Co. in accordance with the suggestion or requirement of the respondents G at the interview of June 27, 1934. The judge found that the respondents then suspected that the process was the secret process, and the property of the plaintiffs. That being so (so ran the argument), the respondents shut their ears to anything which might make their suspicion a certainty, and are consequently fixed with constructive knowledge of the truth. H With that knowledge, they induced Doherty to reveal the process to their patent agents, and disclosure to their agents is disclosure to themselves. A short answer would be that this case is nowhere pleaded. The only plea is disclosure to the respondents themselves, and, even if disclosure to an agent in the legal sense came within the plea, people

who carry on the profession of advising in regard to applications for patent rights do not appear to me to fill the character of agents in giving advice, any more than does a counsel who writes an opinion upon a question of patent law. There is, however, a further answer—namely, that the contention is made in the teeth of the judge's findings.
A So far from the respondents closing their ears to anything which might turn their suspicion into a certainty, and so being fixed with constructive knowledge, they adopted a course (as found by PORTER, J.) for the purpose of ascertaining, and by which they thought they would decisively ascertain, whether or not the process was the property of the plaintiffs.
B Those being the facts, it would be, in my opinion, impossible to hold that the respondents possessed, constructively or otherwise, the knowledge which is an essential ingredient to the cause of action. For these reasons, I would dismiss this appeal with costs.

C LORD THANKERTON: My Lords, I am requested by my noble and learned friend LORD WRIGHT to express his concurrence in the opinion which has just been delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN.

D LORD ROMER: My Lords, the appellants by their statement of claim in the action alleged that the respondent company and its managing director, the respondent Ferguson (hereinafter called the respondents), wrongfully induced the defendant Doherty to commit a breach of his agreement of service with the appellants by disclosing to the respondents
E a secret process of manufacture, the property of the appellants. That the respondents did in fact induce Doherty to make such a disclosure of the process, and that such disclosure was in breach of Doherty's service agreement, is not now disputed, but it is plain that this did not give the appellants any right of action against the respondents unless the latter
F at the time of the disclosure had actual or constructive knowledge that the process disclosed was the process of the appellants. The question whether or not the respondents had such knowledge is purely one of fact. PORTER, J., who tried the action, decided that question in favour of the respondents. That there was evidence upon which he could
G properly so decide it is, in my opinion, quite clear, if Ferguson and his co-director Welch were honest witnesses. PORTER, J., came to the conclusion that they were. He found that they honestly, though stupidly, thought that, as their patent agents had reported that the process was patentable by Doherty, it could not possibly be the process
H in use by the appellants, secret or otherwise. Their stupidity consisted in not realising that the patent agents would concern themselves solely with the question of anticipation by existing patents, and would not concern themselves with any question of want of subject-matter owing to prior user. In the words of MACKINNON, L.J., in the Court of Appeal, the honesty of Ferguson was vindicated at the expense of his intelligence

The same may be said of Welch. However, their honesty was vindicated by PORTER, J., who had the great advantage of seeing them and observing their demeanour in the witness-box. It would be quite impossible for your Lordships, who have not had that advantage, to arrive at a different conclusion. The action, so far as it was based upon the disclosure to the respondents themselves, was, therefore, as held by the Court of Appeal, rightly dismissed.

Before that court, however, the appellants sought to establish an alternative claim against the respondents, based upon the disclosure of the process by Doherty to the respondents' patent agents, but not advanced at the trial before PORTER, J. This disclosure naturally took place before the patent agents had reported to the respondents that the process was patentable, and at a time when it might have been contended that the respondents were affected by constructive knowledge of the ownership of the process, for the respondents were suspicious at that time that the process might turn out to be the process of the appellants, and PORTER, J. was of opinion that, if, at that time, the respondents had induced, Doherty to reveal the process to them, they would have been liable. How, then, it was argued, could they escape liability by inducing Doherty to break his agreement with the appellants by disclosing the process to the patent agents ? It is a plausible argument. However, one short and sufficient answer to it is that this alternative contention was not open to the appellants on the pleadings, and was not even mentioned at the trial before the judge. It was not open on the pleadings, for I agree with my noble and learned friend LORD RUSSELL OF KILLOWEN, whose opinion just delivered I had the privilege of seeing beforehand, that, even if disclosure to an agent of the respondents were covered by the allegation in the statement of claim to which I have referred, the patent agents were in no sense the agents of the respondents. This objection might have been met by allowing an amendment of the pleadings on suitable terms, but the objection that the alternative claim was not advanced at the trial is a different matter. It is not a merely technical objection. It is one of substance. Had the claim been then raised, evidence might have been specifically directed to a question upon which I am not at present at all satisfied. It is the question whether the disclosure by Doherty to the patent agents can be said to have been induced by the respondents. I have studied the evidence given by Ferguson and his co-directors as to their first interview with Doherty, and I am not satisfied that they did more than intimate to him that they could accept no disclosure of the process until they were assured by patent agents that the process was patentable. If this were so, I fail to see how they could properly be charged with having induced him to make a disclosure to the patent agents, even though they mentioned their own patent agents—that is to say, the patent agents whom they usually employed—as persons whose opinion they would be willing to accept, and even though they agreed to pay the patent agents' fees. However this may be, though, the question of inducing or not inducing a disclosure to the patent agents must turn upon the further question whether the directors urged Doherty to make such a disclosure or merely left it to his option whether or not he would make it. Had the point been raised at the trial, the evidence would have been specifically addressed to this further question. As the point was not raised, no attention was paid to it by the judge or by the respondents' counsel. It is accordingly too late to raise the question now. For these reasons, I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Crane & Hawkins* (for the appellants) ; *Chas. G. Bradshaw & Waterson* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

NAAS *v.* WESTMINSTER BANK, LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **November 29, 30, December 4, 5, 6, 13, 1939, February 6, 1940.**]

Deeds—Settlement—Execution by one party—Settlement in satisfaction of covenant and containing release of covenant—Sufficiency of execution by one party—Execution upon faith of execution by other parties.

In a deed executed in 1923, A covenanted to pay B a weekly sum to be applied to the maintenance of herself and a son then expected to be, and afterwards in fact, born. By that deed, A had an option to execute a settlement by which similar benefits should be secured to B and the son, such settlement to be in satisfaction of the weekly sum payable under the deed. A settlement was engrossed to which A and B were parties, the plaintiff bank also being named as a party as the trustee. The settlement secured to B and the infant benefits similar to those in the deed of 1923, and also contained a release of the covenant in that deed. The settlement was executed by A and unconditionally delivered to B, who, it was alleged, refused to execute it, and eventually returned it unexecuted. The property settled was India stock, and, after the execution of the settlement by A, this was sold by the bank and the proceeds paid to A. The bank did not execute the settlement. B sought a declaration that the handing over of the proceeds of sale constituted a breach of trust :—

HELD : (i) the settlement, being an absolute and unconditional declaration of trust in its terms, and not having been delivered as an escrow, became binding on the settlor, although not executed by B.

(ii) there was no evidence that the settlement was executed on the faith either that B would execute the deed of settlement or that she would grant a release from the obligations under the deed of covenant. The court will refuse to enforce a deed against an executing party on the ground of non-execution by another party only where the obligation sought to be enforced is different from the obligation which would have been enforceable if the non-executing party had executed the deed.

(iii) in the circumstances, the return of the settlement unexecuted did not amount to a disclaimer of the rights thereunder, as there was no knowledge of the interest alleged to be disclaimed, and no evidence of an intention to disclaim.

Order of Court of Appeal ([1938] 3 All E.R. 652) *reversed and order of* MORTON, J., *restored.*

[**EDITORIAL NOTE.** SIR GEORGE JESSEL, M.R., in *Luke* v. *South Kensington Hotel Co.* (4), stated that two persons, executing a deed on the faith that a third will do so, are not bound by the deed if the third does execute it, provided that other parties are aware that it was executed on that understanding. It is here decided that this statement is too wide. The court will refuse to enforce the deed in such circumstances where its enforcement would lead to injustice and the party against whom it was enforced would suffer some substantial loss. The statement was only an *obiter dictum* by SIR GEORGE JESSEL, M.R., and the position is here fully explored by the House of Lords.

AS TO EXECUTION BY ONE PARTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 86, para. 134; and FOR CASES, see DIGEST, Vol. 17, pp. 203-205, Nos. 140-169.]

Cases referred to:

(1) *Morgan* v. *Pike* (1854), 14 C.B. 473; 17 Digest 223, *384*; 23 L.J.C.P. 64; 22 L.T.O.S. 242.

(2) *Macdonald* v. *Law Union Insurance Co.* (1874), L.R. 9 Q.B. 328; 17 Digest 223, *376*; 43 L.J.Q.B. 131; 30 L.T. 545.

(3) *May* v. *Belleville*, [1905] 2 Ch. 605; 17 Digest 223, *378*; 74 L.J.Ch. 678; 93 L.T. 241.

(4) *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch.D. 121; 17 Digest 222, *370*; 48 L.J.Ch. 361; 40 L.T. 638.

(5) *Underhill* v. *Horwood* (1804), 10 Ves. 209; 26 Digest 139, *1031*.

(6) *Re Dover, Hastings & Brighton Junction Ry. Co., Carew's Case (No. 2)* (1855), 7 De G. M. & G. 43; 17 Digest 222, *367*; 24 L.J.Ch. 769; 24 L.T.O.S. 329.

(7) *Evans* v. *Bremridge* (1856), 8 De G. M. & G. 100; 17 Digest 222, *366*; 25 L.J.Ch. 334; 27 L.T.O.S. 8.

(8) *Re Smith, Fleming & Co., Ex p. Harding* (1879), 12 Ch.D. 557; 26 Digest 50, *344*; 48 L.J.Bcy. 115; 41 L.T. 517.

(9) *Cooper* v. *Evans* (1867), L.R. 4 Eq. 45; 26 Digest 78, *557*; 36 L.J.Ch. 431.

(10) *Bowker* v. *Burdekin* (1843), 11 M. & W. 128; 17 Digest 211, *231*; 12 L.J.Ex. 329.

(11) *Xenos* v. *Wickham* (1866), L.R. 2 H.L. 296; 17 Digest 204, *149*; 36 L.J.C.P. 313; 16 L.T. 800; *revsg.* (1863), 14 C.B.N.S. 435.

(12) *Cock* v. *Richards* (1805), 10 Ves. 429; 7 Digest 169, *72*.

(13) *Butler & Baker's Case* (1591), 3 Co.Rep. 25 a; 17 Digest 205, *169*.

(14) *Bolitho* v. *Hillyar* (1865), 34 Beav. 180; 24 Digest 950, *39*.

(15) *Peto* v. *Peto* (1849), 16 Sim. 590; 24 Digest 950, *38*; 13 L.T.O.S. 134.

APPEAL from an order of the Court of Appeal (SIR WILFRID GREENE, M.R., SCOTT and CLAUSON, L.JJ.), dated July 28, 1938, and reported *sub nom. Westminster Bank, Ltd.* v. *Wilson*, [1938] 3 All E.R. 652, reversing part of an order of MORTON, J., dated Jan. 21, 1938. The facts and arguments are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

Serjeant Sullivan, K.C., J. M. Gover, K.C., F. E. Skone James and *Arthur D. Houston* for the appellants.

Rt. Hon. Sir William Jowitt, K.C., H. Wynn Parry, K.C., and *Valentine Holmes* for the respondents.

VISCOUNT MAUGHAM: My Lords, I have had the advantage of reading the reasons of my noble and learned friend LORD RUSSELL OF KILLOWEN on this appeal, and I find myself in agreement with them. No useful purpose, therefore, would be served by a restatement of the somewhat complicated facts and documents, and, if it were not for the circum-
A stance that, like my noble friend, I felt compelled to differ from the judgments of the Court of Appeal, I would add nothing of my own. The appeal, however, raised points of considerable importance, and, out of respect for the Court of Appeal, I will state in my own language the grounds on which, as I viewed the case, the appeal was allowed and
B the judgment of MORTON, J., restored.

The first point to be considered is the effect on the deed of covenant, dated Feb. 1, 1923, of the settlement executed in Aug., 1925, by the covenantor (a gentleman whom I propose to call the settlor). Is the settlement one which is in pursuance of, and in accordance with, the
C option given to the settlor by cl. 4 of the deed of covenant, or, alternatively, is the declaration contained in cl. 17 of the settlement a declaration which, under cl. 5 of the deed of covenant, is final, binding and conclusive on all parties? In either event, the covenant for payment in cl. 1 of the deed of covenant comes to an end under the express terms
D of cl. 1 of that deed. In answering this question, it is to be noted that the settlement was plainly intended to be such a settlement as was contemplated by the deed of covenant, since the settlement contains a recital of that deed, including cl. 5 thereof. It is true that the settlement gives to Miss Wilson a life interest which comes to an end if
E she does, or attempts to do, any act or thing, or any event happens, whereby, if the same were payable to her absolutely for her life, she would be deprived of the right to receive the same or any part thereof, but the deed of covenant contained a substantially similar limit to the covenant for payment in cl. 1. Assuming this would not be an annuity "during
F the life" of Miss Wilson, as contemplated by cl. 4 of the deed of covenant read alone, we have to bear in mind the provision in cl. 5 which gives the settlor a free discretion to insert in the settlement under the option "any trusts not repugnant to the preceding text," coupled with a provision that:

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> . . . any declaration by him that the same is in satisfaction of the provisions hereinbefore contained shall be final, binding and conclusive.

I have formed a clear opinion that these two clauses are sufficient to justify the insertion of the protected life interest in the settlement, and that the deed of covenant came to an end to all intents when the
H settlor executed the settlement in Aug., 1925.

It may be said that this construction of the deed of covenant is one as to which there can be a legitimate difference of opinion, as is indeed evident from the judgments of the Court of Appeal. This leads me to my second point, as regards which I cannot see any room for legitimate doubt, and that is that Miss Wilson could not knowingly accept any benefit under the settlement without releasing all her rights, if any, under the deed of covenant. The settlement proceeds on the footing that those rights are extinguished. It is clear beyond doubt that a party who knowingly takes the benefit of a deed is bound by it although he has not executed it. Her own solicitor had approved the form of the settlement, so that there is no question of surprise or duress or misunderstanding. The principle I have stated is to be found in the year books, but it is not necessary to go back earlier than Coke upon Littleton 230 b, note (1). There are a number of later authorities, see *Morgan* v. *Pike* (1), *Macdonald* v. *Law Union Insurance Co.* (2), at p. 330, and *May* v. *Belleville* (3), at p. 612. It follows that it was immaterial whether or not Miss Wilson executed the settlement, if she accepted her allowance from the respondents (whom I will call the bank) as trustees of the settlement. She did in fact accept that allowance from the bank from the time when the settlement was executed until Nov., 1926. In my opinion, she was bound by the settlement long before the settlor purported to revoke it on the alleged ground that the lady had not executed it.

However, it is then asserted—and this, I think, is the third point—that it was more satisfactory to the settlor to have an express release by Miss Wilson, as provided by cl. 16 of the settlement, that the instrument provided for such a release, and that the deed was executed by the settlor "upon the faith" that Miss Wilson would execute it. It is true, as pointed out by Sir Wilfrid Greene, M.R., that it was open to the settlor to stipulate for a release, and that, by the form of the deed, a release was to be given. On the other hand, it is admitted—and I doubt not rightly admitted—that the settlement was not executed as an escrow. Nor is it argued that, upon the true construction of the settlement, there was an implied condition in law that Miss Wilson should execute the settlement. Nor is it suggested that the settlor, when he delivered the document as a deed, made any statement to anyone, or that he expressed an intention that it was not to take effect until Miss Wilson had executed it. What is contended is that he can escape liability under the settlement on an equitable principle which was formulated by Sir George Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.* (4), at p. 125:

> It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute . . .

This *dictum*, for it was no more, having regard to the facts of the case, now requires consideration. Sir George Jessel, M.R., was purporting to state the existing law, which he said was well settled. Your Lordships have, I think, been referred to all the reported cases on the subject, and I think it is safe to say that, stated in the wide form which Sir George Jessel, M.R., employed, it is not to be found in any previous authority. There are, I think, three typical cases which directly deal with the point—namely, *Underhill* v. *Horwood* (5), *Re Dover, Hastings & Brighton Junction Ry. Co., Carew's Case* (*No. 2*) (6), at p. 52, and *Evans* v. *Bremridge* (7). All the cases, so far as I can find, relate to persons who were undertaking obligations of guarantee or suretyship A on the terms, plain from the instrument or instruments themselves, that others would share their liability. All are cases where it was sought to impose on a man a greater liability than he had ever intended to bear, where his intention was not in doubt, and where, if he were not able to get equitable relief, he would suffer substantial loss.

B It is necessary to mention here that, apart from the equity relied on, there is no doubt as to the position at law. The settlement having been delivered unconditionally, and not as an escrow, it was, as SIR WILFRID GREENE, M.R., said [at p. 655] "unquestionably the deed of the settlor." The settlement, according to its terms, had the effect of C vesting equitable rights of property in the lady and the infant. The deed, as SIR WILFRID GREENE, M.R., also pointed out, was effective to convey the property and to bind the settlor according to its terms, notwithstanding that the lady did not execute it, and he cited some out of the many authorities which showed beyond doubt the legal view of D the effect of such a deed. It became, as he said, at p. 658, "immediately effective, according to its terms, so far as the settlor was concerned," and, as he said, at p. 659:

> . . . effective to divest him of his equitable interest immediately upon its execution by him, and to vest it in the beneficiaries.

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My Lords, I think all your Lordships are of opinion that the judgment to which I have referred up to this point is unquestionably correct. The contrary view entertained by SCOTT and CLAUSON, L.JJ., who treated the matter as analogous to one of offer and acceptance, is a little difficult F to follow in the case of a deed with declarations of trust, and counsel for the bank found himself unable to support it. I think it sufficient to say, following SIR WILFRID GREENE, M.R., and without repeating the remarks on this point of my noble and learned friend LORD RUSSELL OF KILLOWEN, that it appears to me that there was an unconditional G declaration of trust by the settlement, and nothing remained to be done by the settlor. Miss Wilson no doubt could, but the infant could not, disclaim, and there was clearly no disclaimer by Miss Wilson of the grant to her.

Having said this, I must now return to the equity relied on, and H first I must remark that this is clearly one of those equities whereby the Court of Chancery was accustomed by injunctions *in personam* (in effect) to override judgments at common law in order to correct harshness or to prevent the legal right being made an instrument of oppression. There are a great number of examples to be found in the books, but I do not think there can be found one in which the Court of Chancery interfered with the legal right unless it was satisfied that it was necessary to prevent serious injustice.

My Lords, with all respect to the memory of a great judge, I must state my opinion that the principle is too widely stated by SIR GEORGE JESSEL, M.R., in *Luke* v. *South Kensington Hotel Co.* (4), and I doubt the wisdom of any attempt rigidly to define it. The words "if two A
persons execute a deed *on the faith* that a third will do so" probably mean "in the expectation that a third will do so and with the intention that the two persons will not otherwise be bound." SIR GEORGE JESSEL, M.R., adds the words "and that is known to the other parties," but I do not think, as the authorities above cited show, that that B
addition is justified in all cases. It may be observed parenthetically that, in the present case, there is no evidence to show that Miss Wilson knew that the settlor had executed the settlement "on the faith" that she too would do so. However, I think that two propositions as regards the equity in question may safely be asserted—namely, (i) that the C
intention of the person who is setting it up is not a matter of mere conjecture, and (ii) that the equity comes into play only when, in its absence, the legal effect of the unconditional execution of the deed will lead to substantial injustice.

On the first point, it is sufficient to cite a passage from the judgment D
of JAMES, L.J., in *Re Smith, Fleming & Co., Ex p. Harding* (8), at p. 564. One Fleming, a partner in a firm named Nicol & Co., in which there were four other partners, had signed a guarantee in which two only of the other partners had joined. JAMES, L.J., observed as follows, at p. 564:

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> But it is said that by the original agreement it was intended that all the five partners in Nicol & Co. should join in the guarantee, and as only three of them did join, the liability cannot be enforced against those three. The answer is that that is an equity which must be alleged and proved. If three persons sign a document, and it is said that they are not liable, because the intention always was that they should not be liable unless some other persons should also sign, that is an equity to get rid of a legal liability. Fleming has not alleged anything of the kind. . . .

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On the second point, I think that the nature of the equity is itself enough to prove that the equity cannot be invoked on a matter of form rather than substance. If authority is needed, I think *Cooper* v. *Evans* (9) may be referred to. The facts in that case might perhaps have justified a different conclusion, but in principle I have no doubt that the decision G
was correct. It is hardly necessary to say that the Judicature Acts have not altered the grounds on which the equitable principle is applicable. I will add that I am unable to see any ground on which the equity relied on could ever be applied so as to destroy an equitable interest unconditionally created in favour of a person who, not being a party to the deed, H
was, of course, not intended to execute it.

My Lords, in the view I have expressed that the execution of the settlement by Miss Wilson was a matter of no importance to the settlor, and in view of the fact that he, though called as a witness at the trial, gave no evidence that he executed the settlement on the faith that

Miss Wilson would also execute it, I am of opinion that there is no ground in this case for the application of the equity in question, which seems to have been due to the ingenuity of counsel rather than to the true intentions of the parties. For myself, I see no reason to suppose that the settlor cared two straws whether or not the lady executed the document.
A He was making a generous provision for the infant in whose future he was at that time greatly interested, and I cannot believe that he would have desired this provision to fail merely because Miss Wilson was seeking, as a condition of her execution, to have the deed of covenant destroyed, for reasons which probably commanded his sympathy. If he had
B made any inquiry on the matter from his solicitors, he would certainly have been told that the lady could not claim both under the deed of covenant and under the settlement, and that it was perfectly obvious to all concerned that it was to her interest to claim under the latter. In any case, it mattered nothing to him, since, as I have pointed out, she
C could not claim to be paid under both instruments. The view of the Court of Appeal as to the intention of the settlor in this matter is, with all respect, founded on conjecture alone. I do not think that any of your Lordships are disposed to make the same conjecture, and it seems clear to me that an equity to set aside an executed deed cannot be
D applied on so doubtful a foundation.

I regret to find myself differing on another point from the Court of Appeal. Let us assume that the equity was applicable, and that the settlor could insist on the execution of the settlement by the lady. What then? Is there anything on the facts to show that she declined
E to execute it? She tried, no doubt, to get the settlor to agree to the destruction of the deed of covenant. This desire on her part could be rational only if the settlement was to be effective. The negotiations on this minor point came to a head, and were settled between the settlor and the lady in Dec., 1925, and her letter of Dec. 23 to the settlor,
F coupled with her evidence, shows quite clearly that she was relying on the settlement, and, as the trial judge held, that she was willing to sign it. She travelled on the Continent after that date, leaving the settlement behind, and there was much delay, but she was paid by the bank as trustees £130 per quarter out of the income of the stock in
G settlement. My noble and learned friend LORD RUSSELL OF KILLOWEN in his opinion has commented on the correspondence, and I agree with his remarks. I will add, however, that to me it is clear that Miss Wilson never refused to execute the settlement, and that the assertions on behalf of the settlor that she had done so are wholly inaccurate. As I have
H said, she was actually receiving £130 per quarter from the bank out of the income of the settlement. Never, from first to last, was she told that the settlor peremptorily required her to execute the document, nor did he or his solicitors seek to make her execution within a limited time of the essence of the matter. When the solicitors for the settlor were endeavouring to get for him the proceeds of sale of the settled stock,

and wrote to her solicitors on the matter in Feb., 1927, they received the answer that the lady was prepared to execute the settlement. The contention then raised was that the settlement was merely an offer, a proposed settlement, which the settlor had "revoked." These contentions seem to me to be without foundation, and I need not further deal with them. Reliance is, however, placed on the facts that on May 16, 1927, the solicitors for Miss Wilson returned the settlement to the settlor unexecuted and that she thus made clear her intention not to execute it. Quite apart from the difficulty that she could not put an end to the equitable assignment in favour of the infant, I do not so understand the letter. The settlement was returned as the result of demands and threats of divers legal proceedings, and after a distinct offer by her on Apr. 20, 1927, to execute the settlement. Moreover, it had been repeatedly and erroneously stated that the settlor had revoked the document, which, of course, implied that he was entitled to revoke it, and that the document was valueless, while as a piece of paper it was the property of the settlor. In these circumstances, I can attach no importance to the fact that the settlement was returned in a letter which plainly reserved the rights of Miss Wilson and the infant to have a settlement in the same terms executed by the settlor.

The decision of the Court of Appeal was naturally affected by the view that they were bound by the decision of that court in *Luke* v. *South Kensington Hotel Co.* (4), and by their desire to follow the statement by Sir George Jessel, M.R., of the equity, which I think they looked upon as entitling the settlor to say he was no longer bound by the deed which he had sealed and delivered. For the reasons I have given, I cannot agree with this view. I think that the equitable interests created by the settlement were never destroyed, and that whether or not Miss Wilson executed the settlement. In my view of the facts, she never refused to execute it. In my opinion, even if she was bound to execute it, time was not of the essence, and her formal offer to execute it in Feb., 1927, was not too late.

The bank unfortunately were not fully informed as to the facts by the solicitors of the settlor. They had, however, full notice of the settlement and its contents before they handed back the proceeds of sale of the stock to the settlor. They paid until Nov., 1926, the quarterly sums payable under the settlement to Miss Wilson. They were given copies of certain letters inaccurately alleged to show a definite refusal by her to execute the settlement. They realised on Nov. 16, 1926, that they ought to obtain her consent to handing the proceeds to the settlor. How they thought this would protect them against a claim on behalf of the infant does not appear. They rightly stated on Nov. 18, 1926, that it was quite clear that they had notice of the settlement. With some trouble, they obtained a copy of it. On Jan. 24, 1927, they obtained from the solicitors for the settlor a promise to give notice to Miss Wilson of the proposed withdrawal of the trust funds by the settlor. Strangely enough, they gave an undertaking not to communicate with their supposed beneficiary on the subject of the proposed withdrawal. They preferred to accept the statements of the solicitors for the settlor, coupled with an indemnity given by him, rather than to take the usual course. Ultimately, on June 11, 1927, they took the step of writing to the solicitors for the lady to say that they proposed to pay over the fund to the settlor within a week unless proceedings were commenced to restrain them from doing so. They were left to take their own course. No proceedings were taken, and the settlor received the trust funds. The problem which was presented as regards the deed of covenant—namely, whether or not it was at an end from the date when the settlement was executed—was never solved, nor did the bank's advisers. as far as one can see, tackle the question as to how the declaration of trust in favour of the infant had been rendered null and void. I agree with the judge who tried the case both on the facts and on the law, and I do not see how the bank can escape liability.

My Lords, there was great delay by the lady in asserting her rights against the bank, and her numerous changes of solicitors, with, it would seem, somewhat contradictory instructions, were probably not conducive to her interests in the matter. I am glad to note that from the start the bank generously stated that, if the infant's claim was held to be a good one, they did not desire to take the point that the lady might, by her conduct, have disentitled herself to relief. It was, therefore, unnecessary to consider whether or not there was anything special in the lady's conduct which might have prevented her succeeding on her counterclaim. For the above reasons, My Lords, I was of opinion that the appeal should succeed and that the order of MORTON, J., should be restored with costs here and below.

LORD RUSSELL OF KILLOWEN: My Lords, the question which was in issue on this appeal can be shortly stated. It was whether the plaintiff bank were trustees of a sum of India Stock for the defendants, and acted in breach of their trust in paying over the proceeds of sale of that stock to the former owner thereof. MORTON, J., decided both questions in the affirmative, and, on a counterclaim by the defendants to the action, gave relief against the bank upon that footing. The Court of Appeal discharged the judgment of MORTON, J., and dismissed the counterclaim. The defendants then appealed to your Lordships' House.

Although the issue can thus be shortly stated, it will, I fear, be necessary to mention the relevant facts in some detail, in order to make clear the grounds for my opinion that the judgment of MORTON, J., was right. On Feb. 1, 1923, a gentleman (whom I will without prejudice refer to as the settlor) executed a deed of covenant with the first appellant (therein called the beneficiary) under which he covenanted to pay to her as from Mar. 31, 1923, such a weekly sum as, after payment of income tax thereon, would leave the clear sum of £10 per week. This sum was to be paid to her during her lifetime (or until she should do or permit some act or event, whether voluntary or involuntary, by which the same, if her absolute property, would be forfeited, or vested in or payable to some other person or persons or a corporation, or inconsistently with her personal enjoyment of the whole) or:

> . . . until the execution by the settlor of a settlement in accordance with his option in that behalf [thereinafter contained].

The option referred to was contained in cl. 4, which, with cl. 5, must be quoted *verbatim*:

> 4. Provided always that in case the settlor shall by will bequeath or by settlement secure to the beneficiary during her life an annuity of equal or greater amount than the weekly sum hereby made payable as aforesaid then the annuity so bequeathed or secured shall be in satisfaction of such weekly sum which shall in that case cease to be payable from such date.
>
> 5. Any provision made by the settlor for the beneficiary as in the last clause is contemplated may contain any trusts not repugnant to the preceding text which the settlor may desire and any declaration by him that the same is in satisfaction of the provisions hereinbefore contained shall be final binding and conclusive on all parties.

In the autumn of 1923, the settlor became desirous of making a settlement in favour of the first appellant and the infant appellant, and, with a view thereto, procured to be inscribed in the bank's name a sum of £15,000 India 4½ per cent. stock to be held meanwhile to the settlor's order, pending further instructions. As the bank stated in their letter to the first appellant of May 6, 1924:

> . . . the settlement has not yet been executed, and for the time being we are merely holding the stock at the disposal of the settlor.

Some delay occurred before the draft of the settlement had been approved by all parties, but ultimately the settlement was engrossed and executed by the settlor on or shortly before Aug. 12, 1925. It was admitted that the deed was signed, sealed and unconditionally delivered by the settlor. About that there was no dispute. The appeal was to be decided on that footing. The settlor's execution was not attested, nor was the deed dated, but neither fact is in any way material.

The contents of the deed must now be noticed. It is expressed to be made between the settlor of the first part, the first appellant (therein called the first beneficiary) of the second part, and the bank of the third part. It recites (i) the deed of covenant of Feb. 1, 1923, and, in particular, cll. 4 and 5 thereof, (ii) that the settlor was desirous to make such provision as thereinafter contained as well for the first appellant as for the infant appellant, and had for that purpose transferred the India stock into the name of the bank, to be held and applied by the bank upon the trusts thereinafter declared, and the settlor had agreed with the first appellant to enter into the covenants on his part thereinafter contained, and (iii) that it had been further agreed between them that, in consideration of the provision made by those presents, the first appellant should release as thereinafter appearing the settlor his executors and administrators from all liability and claims under the deed of covenant of Feb. 1, 1923, and that forthwith upon the execution of those presents the deed of covenant should cease to have effect. The document then proceeds as follows:

> Now this indenture made in pursuance of the said agreement and in consideration of the premises witnesseth and it is hereby agreed and declared as follows . . .

A Trusts are then declared of the India stock in favour of both the appellants. The first appellant is given a determinable life interest in the income of the stock, which is to be applied by the bank in payment to her, so far as it will extend, of the clear weekly sum of £10, and also the balance, if any remaining, at the end of each year, the settlor B covenanting to pay to the bank the moneys (if any) necessary to provide the clear £10 per week for each year. As to the infant appellant, it is sufficient to say that trusts and provisions are declared and contained for his benefit as to both income and capital of the whole of the trust fund. Cll. 16 and 17 are important, and I cite them *verbatim*:

C

> 16. In consideration of the settlement by these presents made by the settlor and the covenants on his part herein contained the first beneficiary hereby releases the settlor his executors and administrators and his estate from all the covenants on his part contained in the hereinbefore recited indenture of Feb. 1, 1923, and from all claims and demands thereunder.
>
> 17. In consideration of the premises it is hereby agreed and declared by and D between the settlor and the first beneficiary that as from the execution of these presents the hereinbefore recited indenture of Feb. 1, 1923, and all the provisions therein contained shall cease to have effect.

The settlement so executed by the settlor was sent to the first appellant for execution by her. She at first wished the deed of covenant to be destroyed, a proceeding to which the settlor's advisers, Messrs. Lewis & E Lewis, would not consent, and on Nov. 16, 1925, her solicitor, Mr. Jacobs, wrote to Lewis & Lewis as follows:

> My client's instructions to me are that unless the first document is destroyed now she does not wish either copy to be in the hands of anyone except herself, and I am afraid that she will not proceed further with the present document unless she is satisfied on this point.

F

Ultimately she came to an agreement personally with the settlor by which it was arranged that the deed of covenant should be deposited with the bank in a box with two locks with different keys, each party keeping a key for one lock only, so that the box could never be opened G without their joint consent. Having been satisfied upon this point, she was ready and willing to execute the settlement. Unfortunately, she was at that time unable to say where the document was. She had received it in Deauville and had brought it back to London. She had then gone abroad again to Paris, St. Moritz, and Algiers, and, indeed, H seems to have forgotten all about executing it herself. The judge, however, after hearing her evidence, found as a fact that, as from a date about the end of 1925, she was always ready and willing to execute the settlement, and would have done so if she had been asked to do so.

Meanwhile, the bank, acting on the settlor's instructions, had, ever since the middle of May, 1924, been paying out of the income of the

India stock the quarterly sum of £130 to the credit of a banking account of the first appellant, and they continued so to do until Nov. 1, 1926. In that month, however, they received a letter from Lewis & Lewis, dated Nov. 9, 1926, which stated that, acting under their advice, the settlor was " proposing to make other arrangements." This was followed by a letter requesting the bank to sell the India stock and remit the proceeds to the settlor. The bank, strange to relate, immediately sold the stock, but some glimmer of the duties and responsibilities attaching to trusteeship seems suddenly to have reached its trustee department, for on Nov. 16, 1926, they wrote a letter to Lewis & Lewis stating that it had occurred to them that, before handing the proceeds to the settlor, the consent in writing of the first appellant should be obtained, and that they had been paying the income of the stock to her for some time, and they asked Lewis & Lewis to advise. I do not comment on the strange attitude here adopted of asking the advisers of the person who was claiming the fund to advise the bank upon the validity of a possible claim by a third party. The danger is apparent from the answer received from Lewis & Lewis, who, in a letter dated Nov. 17, 1926, said that the bank were under no liability to the first appellant, and that her consent was unnecessary, and asked for an assurance that the bank would not communicate with her. It is difficult to speak with restraint of this letter and request, which can only have been written and made by a writer who had forgotten that the settlement had been signed, sealed and delivered unconditionally by the settlor, or who failed to appreciate the effect in law of that act.

Most unfortunately, by letter of Nov. 18, 1926, the bank gave an undertaking not to communicate with the first appellant without referring to the settlor's solicitors—a strange proceeding by trustees of stock who, to put it at the lowest, had an uneasy feeling that they might be trustees of it for the very person with whom communication was forbidden. They still, however, kept the proceeds of the stock, and asked to be told whether the settlement had been executed by the settlor. On Dec. 21, 1926, Lewis & Lewis wrote to the bank that the first appellant had declined to execute the settlement, and that the settlor :

> . . . has since refused to have anything more to do with the proposed settlement and does not intend to carry it through.

On Dec. 24, 1926, the bank pressed for an answer to the question which they had asked some five weeks previously—namely, whether or not the settlement was actually executed by the settlor. The answer was given in a letter, dated Dec. 30, 1926, in which the late Sir George Lewis stated that, while he was unaware of the facts until recently, he had then ascertained them. He enclosed copies of four letters passing between his firm and Mr. Jacobs, the solicitor for the first appellant, dated Nov. 13, Nov. 14, Nov. 16 and Nov. 17, 1925, respectively. The position then, he states, was as follows. The deed had been engrossed and executed by the settlor and sent on Aug. 12, 1925, for execution by the first appellant. She refused to sign it then, and, from the time when her solicitor wrote on Nov. 16, 1925, "I am afraid that she will not proceed further with the present document," the settlor had regarded the proposed settlement as at an end.

A It will be observed that Sir George Lewis (although he enclosed a copy of the letter) did, in quoting Mr. Jacobs' letter of Nov. 16, 1925, omit the words "unless she is satisfied on this point," and, as I have pointed out, the trial judge found upon the evidence that she was so satisfied, and had come to an agreement with the settlor upon the point. B Moreover, the judge held that a letter to the settlor had been written by the first appellant as she was starting for St. Moritz from Paris, on or about Dec. 23, 1925, and had been received by him, in which she thanked the settlor for arranging for the tin-box device, and treated the settlement executed by him as an existing and effective document. C The words used by her were:

> I didn't have time to dig out that settlement you signed, but I will; and do I keep it?

All that is quite inconsistent with the suggestion that from Nov. 16, 1925, the settlor had regarded the settlement as at an end.

D Ultimately, the bank, having obtained a copy of the settlement, obtained separate advice. From the correspondence, it would appear that they were advised that the settlor should give a notice to the first beneficiary "revoking the offer of settlement." The bank informed Lewis & Lewis that, provided such notice were given, and no proceedings E were threatened by the first appellant within one month, they would hand over the fund to the settlor on his indemnity against costs of possible litigation and otherwise. No such notice was ever sent, but, as the result of certain correspondence between Sir George Lewis and Sir John Withers (who was then acting for the first appellant), the deed F of settlement which had been executed by the settlor was handed over by Sir John Withers to the settlor's solicitors, with a letter dated May 16, 1927. I will have to refer to this correspondence and letter, and to the circumstances in which the deed was handed over, in connection with another aspect of this case. For the moment, I merely G state the fact.

On May 17, 1927, Lewis & Lewis wrote to the bank stating that they had written to the solicitors of the first appellant "revoking the offer of the settlement" and had obtained the return of the document, and asking for the proceeds of the stock. The bank in reply asked for a H copy of the notice of revocation. Lewis & Lewis insisted that the settlor's withdrawal of what they termed "the offer of the settlement" and Sir John Withers' knowledge of it were sufficiently proved by the following extract from a letter to his firm dated Feb. 1, 1927:

> As a matter of fact the terms of the proposed new settlement were refused by your client, and our client, as we wrote to Mr. Jacobs, declined to agree the

> alterations which [the first appellant] suggested. In the result [her] solicitor wrote to us that she was not prepared to proceed further with the document, and [the settlor] therefore revoked the offer of the settlement.

Here again we meet an imperfect reference to Mr. Jacobs' letter of Nov. 16, 1925, and the statement to the bank, in the letter of Dec. 30, 1926, that the settlor had "regarded the proposed settlement as at an end" has developed into an assertion that he "therefore revoked the offer of the settlement." A We know from the evidence and findings of MORTON, J., how completely at variance with the true facts the statements proved to be. The bank were by no means satisfied, but nevertheless they were advised to inform Withers & Co. of their intention to hand over the funds to the settlor unless proceedings were taken within B a limited time to restrain them from so doing. The bank accordingly wrote to Withers & Co. on June 11, 1927, that they would hand over the funds to the settlor:

> . . . unless during the course of next week proceedings are commenced to restrain the bank from so doing. C

To this Withers & Co. replied that they had nothing to add to their letter to Lewis & Lewis dated May 16, 1927. The bank, having obtained a copy of that letter for the first time, repeated their intention of handing over the funds to the settlor, and on June 27, 1927, on receiving the D settlor's indemnity, they paid over the proceeds of sale of the stock, with interest and accumulated income, to his solicitors.

My Lords, that is the whole story as regards the bank. Their intimation of their intention to part with the fund can afford them no protection, and the first question to determine is whether or not there E was an effective settlement of the stock made by the settlor when he signed, sealed and unconditionally delivered the deed. If such a settlement was made, the bank admittedly and incontestably had notice of it, and had notice of the beneficial interests thereby vested in the appellants in the India stock which was held by the bank. They became F trustees of the stock for the appellants, and they can have no defence to the claim against them unless on some ground or another the appellants have become deprived of those interests or disentitled to assert them.

Upon this first question, MORTON, J., and SIR WILFRID GREENE, M.R., were in agreement. MORTON, J., in his careful and closely reasoned G judgment held that, on the execution by the settlor, a valid settlement came into being, and the stock became impressed with trusts which the settlor was incapable of revoking, that any mistaken view of the legal position which may have been taken by the settlor or the first appellant mattered not, and that the trusts remained in existence. SIR WILFRID H GREENE, M.R., took the same view—namely, that, on the execution of the settlement by the settlor, his then equitable interests in the stock became vested in the beneficiaries under the trusts declared in the deed. The judgment of SCOTT and CLAUSON, L.JJ., rests on the view that, upon the true construction of the deed, no trust was to come into being except if and when the deed had been executed by the first appellant as well as by the settlor, and that, accordingly, the non-execution by the first appellant left the deed wholly inoperative, and they liken the case to a written offer by one to another followed by nothing more. I can see no justification for this view. The language of the deed in no way supports it. The recital of cll. 4 and 5 of the deed of covenant and the presence in the settlement of cl. 17 indicate that the trusts are being created by the settlor in exercise of his powers under the deed of covenant. The trusts declared under cll. 1, 2 and 3 are immediate trusts. They are not made subject to any condition as to the happening of any event or otherwise. They sprang into existence the moment when the settlor unconditionally delivered the deed. Scott and Clauson, L.JJ., appear to have dealt with the matter as if it lay in contract and was governed by the rules as to offer and acceptance, with time being in some way of the essence of the contract, whereas the case is really one of a divesting and vesting of property. Indeed, in your Lordships' House, counsel for the bank stated that they could not, and did not, attempt to support the reasoning of the judgment of Scott and Clauson, L.JJ. That the view of Morton, J., and Sir Wilfrid Greene, M.R., is correct admits, in my opinion, of no doubt. Once the settlor signed, sealed and unconditionally delivered the deed, the trusts in favour of the appellants were constituted. The appellants became the persons beneficially interested in the stock, and it did not lie in the power of the settlor to undo what he had done. He had no power to revoke the trusts unless such a power was contained in the deed.

However, Sir Wilfrid Greene, M.R., based his decision in favour of the bank on reasons which I must now examine. He held that, although there were trusts completely constituted in favour of the appellants, nevertheless, by reason of subsequent matters, the settlor was entitled as against both appellants to treat the settlement as no longer effective, with the result that the bank committed no breach of trust. As against the first appellant, he put the case on two grounds. The first was that the settlor executed the settlement on the faith that the first appellant would execute it and give the release for which he stipulated, and that, since she had not in fact executed the deed, there came into operation the equitable principle which was referred to by Sir George Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.* (4), at p. 125:

> It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute . . .

The second ground on which Sir Wilfrid Greene, M.R., put the case as against the first appellant was that her action in returning the settlement unexecuted and the language of the letter of May 6, 1927, showed an intention on her part to disclaim the benefits given to her by the settlement, and, therefore, I presume, revested those benefits in the settlor. I will consider the case thus made against the first appellant. Taking the first ground first, SIR WILFRID GREENE, M.R., said, at p. 660 :

> . . . in my judgment, he executed the settlement of 1925 upon the faith that he would get a release.

My Lords, this allegation or opinion that the settlor executed the settlement on the faith of getting a release is not founded on any evidence given by him, nor was it suggested to the first appellant when she gave evidence, nor is it to be found in any of the numerous letters from Lewis & Lewis. I am at a loss to know on what it rests. For myself, I cannot see any necessity for the release, or the value of it to the settlor. It is said that it was of importance because the determinable life interest given by the settlement was not a life annuity within cl. 4 of the deed of covenant. I am not prepared to assent to this view. By the joint effect of cl. 5 of the deed of covenant and cl. 17 of the settlement, the settlement was a settlement within the option conferred by cl. 4 of the deed of covenant, and that deed ceased to operate when the settlor executed the settlement. Even if it was not authorised by cl. 4, it is impossible to conceive that rights could be asserted by the first appellant under the settlement without such assertion involving a release of all her claims under the earlier deed. However, even if it be assumed that the settlor executed on the faith that he would get a release, and that the first appellant was aware of the fact, I am still unable to see how on that ground the settlement had become inoperative in June, 1927, when the bank parted with the fund, or why the first appellant on that ground is prevented from asserting her rights thereunder. The actual decision in *Luke's* case (4) has no relevance here. It merely decided that, since one of three trustees had refused to execute a deed dealing with trust property which was vested in the three, the trust estate was not bound by the execution of the two trustees who had executed the deed. The statement of SIR GEORGE JESSEL, M.R., as to a well-settled principle is an *obiter dictum* and is, in my opinion, much too wide in scope. I know of no equitable principle so wide as that. We were referred to, and I have considered, all the authorities cited in NORTON ON DEEDS, 2nd Edn., p. 21, in relation to this alleged principle, and they do not justify so broad a proposition. I do not think that the proposition can be carried further than saying that the equity arises where a deed is sought to be enforced against an executing party, and, owing to the non-execution by another person named as a party to the deed, the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact executed the deed. The most common instance is the case (such as *Evans* v. *Bremridge* (7)) where only one of two co-sureties named in the deed in fact executes the deed, and it is sought to enforce the deed against the one who did execute. I know of no such equity against a non-executing party who seeks to enforce benefits conferred upon him by the deed. There is no foundation on which the equity could rest in such a case, for by his action he is affirming and adopting the deed and every provision of it, and is bound by it as effectually as if he had executed it.

The second ground upon which SIR WILFRID GREENE, M.R., based his judgment is disclaimer by the first appellant. This ground is, in my opinion, ill-founded, in the circumstances of this case. It involves, however, an examination of both the correspondence which passed between Sir George Lewis and Sir John Withers and the evidence, in order to ascertain whether any disclaimer by or on behalf of the first appellant ever took place. Proceedings had been taken by the settlor which had resulted in the infant appellant having been made a ward of court in or about Nov., 1926. In those proceedings, Sir John Withers was acting for the first appellant. While Sir George Lewis was endeavouring to induce the bank to hand over the proceeds of the stock, Lewis & Lewis wrote to Sir John Withers a letter dated Feb. 1, 1927. As this letter initiated the correspondence which resulted in the first appellant, at the instance of her adviser, parting with the possession of the deed and making the alleged disclaimer, it must be quoted in full. I do not think it is misdescribing it when I say that the story thereby told to Sir John Withers is wholly inaccurate, a fact which I think must be ascribed to ignorance or lack of legal appreciation on the part of the writer. The letter runs thus:

> We are writing to you with regard to a matter which is quite separate from the question which we have been dealing with on the custody summons. Our attention has been called to the fact that for some considerable time previous to Aug., 1925, negotiations were passing between ourselves on behalf of [the settlor] and Mr. M. A. Jacobs, the solicitor then acting for [the first appellant], as to a settlement of Feb. 1, 1923. As a matter of fact, the terms of the proposed new settlement were refused by your client, and our client, as we wrote to Mr. Jacobs, declined to agree the alterations which [the first appellant] suggested. In the result, [her] solicitor wrote to us that she was not prepared to proceed further with the document, and [the settlor] therefore revoked the offer of the settlement, and since Mr. Jacobs' letter of Nov. 16, 1925, the negotiations have been closed and the question of a further settlement has been at an end. The position with regard to this matter was attended to by the conveyance department of our office, and Sir George Lewis knew nothing of these matters until the question which arose on the pending summons with regard to the child, and he thought it would be best that the proposed settlement which had been signed by [the settlor] and which was sent to Mr. Jacobs for [the first appellant's] signature should be returned. Mr. Jacobs, however, informs us that the document was at the time sent to [the first appellant], and that he has heard nothing of it since her instructions to refuse to proceed further with the proposed settlement. We feel sure that you will agree that it is desirable that this document should be returned, as [the settlor] had revoked the offer contained in it, and your client has refused to proceed with it, and we shall be very much obliged if you will kindly obtain from [the first appellant] the document which was sent to her, and return it to us.

I need not pause to point out to your Lordships how far from the truth it was to say that the settlor had offered to make a settlement, that the offer had been refused by the letter of Nov. 16, 1925, that the settlor had, therefore, revoked the offer, and that the negotiations had ever since been closed. We now know that, so far from the settlor then resiling in any way, as between him and the first appellant, their difference in regard to the fate of the deed of covenant had been settled, and the substituted settlement was an accomplished fact.

Sir John Withers saw his client, who told him the true position, and he asked that the matter be completed. Lewis & Lewis, however, in their reply, stuck to their story, and pressed for the return of the document. On Mar. 2, 1927, Sir John Withers endeavoured to obtain A information from the bank, but the bank were unable to give it, owing to the undertaking which had (most improperly) been asked for and given that they would not communicate with the first appellant. He therefore wrote to Lewis & Lewis on Mar. 2, 1927, expressing his natural surprise at the undertaking, stating that he understood from what they B had told him that the settlement had been merely executed as an escrow, and asking for the following information:

> (*a*) Were any funds and if so what funds transferred to the bank by [the settlor] for the purposes of the deed, and what is the position of those funds now? (*b*) A copy of all correspondence with the bank as to the deed or the fund, and (*c*) A copy of any document of revocation. C

In their answer, Lewis & Lewis gave none of the information asked for, except that the India stock was held by the bank in 1923 to the order of the settlor, and had since been sold on his instructions. The letter, dated Mar. 7, 1927, concludes with these observations: D

> We maintain that it is absolutely clear that [the first appellant] refused to proceed with the proposed settlement, and that this is confirmed by what [her] solicitors wrote in 1925, and the proposal of [the settlor] has been revoked. If [she] is not prepared to instruct you to return to us the documents for which we have asked we shall know what course to adopt. In the meantime we rely upon your retaining the document in your possession as arranged.

Sir John Withers wrote on Mar. 17, 1927, that, since Lewis & Lewis E would not give the information, he could do nothing. On Apr. 20, 1927, however, he wrote stating that the first appellant was willing to sign the settlement, and asked whether the settlor would give effect thereto. Lewis & Lewis replied by repeating that the settlor had revoked his proposal. Sir John Withers then approached his client. F As appears from his letters, and I think also from his oral evidence (though his evidence is that of a man who has no clear recollection at all of the events of 1927), his view was that the document, although executed by the settlor, was incomplete and of no binding effect, either because it was merely executed as an escrow or because it was undated, G and unattested, or for some or all of those reasons. He was, therefore, quite prepared to accept the view that the matter still lay in contract, and had never got beyond an offer by the settlor, withdrawn by him before acceptance. He had consulted counsel, and had apparently been advised that the first appellant should return the document with H a letter in a form settled by counsel. I refer to the terms of this letter later. For the moment, I content myself with saying that it is hard to conceive that counsel would have so advised had he (or the solicitor who instructed him) been aware that the deed had been signed, sealed and unconditionally delivered by the settlor.

Sir John wrote letters to his client on Apr. 27, May 4, May 9, May 10 and May 11, 1927. They urge her to authorise him to hand over the document, and they so urge her on the footing that the settlor was not bound, that he was entitled to refuse to carry out a proposal to settle, and, in short, that the view insisted upon by Sir George Lewis was A correct. Matters came to a head when on May 12, 1927, the first appellant asked him to hand the document over to her. Thereupon Sir John, after telling his client that he was doing so, wrote to Sir George, as follows:

> [My client] asked me to-day to hand her the incomplete deed signed by [the B settlor]. I told her that I cannot do so at present but I shall do so on Monday unless I am otherwise prevented.

In reply, Sir George Lewis caused him to be served with a *subpœna duces* to produce the document before the judge before whom an application as to maintenance of the infant was pending in the wardship C proceedings. Thereupon Sir John wrote to his client on May 13, 1927, informing her of this, and saying that he therefore could not part with the deed. The letter continued as follows:

> I have done my very utmost for you, spared no personal trouble, and have got the case on proper and reasonable lines, but it is obvious that you will not take D my advice and that of [counsel] and therefore under those circumstances, I am afraid there is no alternative but to say, with great regret, that I cannot act for you, and must ask you to make other arrangements.

Yielding to this pressure, the first appellant gave her consent in a letter to Sir John Withers of May 14, 1927:

> E I have received your letter but really cannot understand the letter at all. I gather from our conversation that nothing was going to be done about the document until Monday, but I quite appreciate now that it must be returned at once, so will you have a certified copy made and send off the document to Messrs. Lewis & Lewis with a letter as suggested by [counsel], or if this cannot be done at the moment, please say I agree it shall go to them as soon as it has been produced by the court. This I hope will stop any fresh proceedings. I sincerely trust you will not persist in your refusal to continue to act for me as I do not know what F I shall do, as I have actually always relied on your advice. I trust this letter shows I intend acting in accordance with it.

Immediately on receipt of that letter, Sir John Withers sent the document to Sir George Lewis, accompanied by a letter, dated May 16, 1927, which had been settled by counsel:

G

> Under the present circumstances we are advised that [the first appellant] is not entitled to retain the document executed by [the settlor], and we accordingly return it in accordance with his request conveyed through you. This however must not be taken as any admission [that the settlor] is under no obligation to execute a settlement in the terms of that document, and the return of the document is without prejudice to any question as to the rights of [the first appellant] or the infant to have a settlement executed. We wish formally to repeat that [the first H appellant] is willing to execute a settlement in the terms of the document executed by [the settlor].

My Lords, I have given in detail the circumstances leading up to the handing over of the deed, because, in my opinion, when those circumstances are considered, it is impossible to say that there was any disclaimer of her interest under the settlement by or on behalf of the first appellant. In my opinion, disclaimer can only be made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it. So far as her legal advisers were concerned, they were misled by the statements insisted upon by Sir George Lewis. They had not, and could not have, any knowledge of the unconditional delivery of the deed, and must have believed that, in the circumstances, the deed was inoperative, and that the whole matter was capable of revocation and had been effectively revoked, with the result that there could be no interests to disclaim. In this they were misinformed and mistaken, but their mistake cannot affect the rights of the beneficiaries under the deed. As regards the first appellant herself, so far from finding any intention on her part to give up her rights under the deed, I find that the evidence points the other way. She had settled her difficulty with the settlor by the end of 1925, and ever since then was prepared to execute the document. It was overwhelmingly to her interest that the document should stand and be substituted for the deed of covenant, because under it provision was made for the infant, and, when in her letter of May 14, 1927, she gives her consent to the handing over, she makes it clear that she still treats the settlement as operative, because she stipulates that it shall be produced to the judge who in the wardship proceedings is to deal with the maintenance of the infant. Two passages from her oral evidence may well be quoted in this connection. The first is as follows:

> When Sir John Withers told me that I would lose my boy if the deed was not handed over, and that he would refuse to act for me, I did authorise him to hand it over, but on the understanding that it would be produced in court.

The second passage from the oral evidence of the first appellant is as follows:

> I did place a lot of reliance on it [the settlement] because it was a capital for my boy. It did not affect me, and it does not affect me now, but it does affect my boy.

In my opinion, the second reason for deciding in favour of the bank given by Sir Wilfrid Greene, M.R., is not well-founded.

The case in favour of the infant appellant is an *a fortiori* case. Although no question of disclaimer by an infant could arise, Sir Wilfrid Greene, M.R., was of opinion that his rights must stand or fall by the action of the first appellant. I find a difficulty in accepting the view that, assuming, as Sir Wilfrid Greene, M.R., held, that a trust had been completely constituted in favour of the infant, he can lose his beneficial interest thereunder by any action on the part of his mother. However, since I have already expressed the opinion that the first appellant has not been deprived of her beneficial interest under the settlement by any action on her part, or by reason of the application of any equitable principle, it is unnecessary to pursue the matter any further.

My Lords, I have not forgotten that the bank's attitude on this appeal was that, if they could not defeat the infant's claim, they would not resist the first appellant's claim to relief. Notwithstanding this, being of opinion that the first appellant was entitled to succeed on the merits of her own case, I have thought it right to deal with the whole matter in detail, in stating the reasons why I was of opinion that the appeal should succeed, and why I voted for the restoration of the order of Morton, J.

Lord Wright [read by Lord Romer]: My Lords, I have had the privilege of reading in print the opinion which has just been delivered by my noble and learned friend Lord Russell of Killowen. He has so completely and accurately analysed the tangled web of fact and misconception which grew up in this case, primarily due to an erroneous view of the position stated and reiterated to all parties by the settlor's solicitors, that I do not desire to add anything on the facts. The statement of Lord Russell of Killowen agrees in all substantial respects with that contained in the careful and convincing judgment of Morton, J., with which, like my noble and learned friend, I am in agreement. I shall merely add some general observations on the case out of respect to the members of the Court of Appeal from whom I have the misfortune to differ.

The crucial issue is whether the deed of settlement was unconditional so as to vest immediately on execution the beneficial interest in the India stock in the appellants. In the Court of Appeal, it has been held that it had not that effect. Sir Wilfrid Greene, M.R., so held, as I understand his judgment, on the ground that the settlement did not bind in equity, because, though unconditional in law, it was in equity subject to a condition which was never fulfilled—namely, that it should be executed by the first appellant, or at least that that circumstance constituted an equitable ground for relief. Scott and Clauson, L.JJ., on the contrary, relied, not on any equitable principle, but on the construction of the deed in law, which they adopted, being of opinion that it was bilateral, and not unilateral, and was not binding until the first appellant by her execution of the deed released the pre-existing deed of covenant. These two views, though directly inconsistent, do, however, agree in holding that the deed did not take effect and was never binding. On neither view is it material to determine whether there was, in the strict sense of the term, a disclaimer by the first appellant of the benefits under the deed, because either view denies her any benefit except on terms of her executing it, which in fact she never did. Both views proceed on the assumption that the instrument was not an escrow. Indeed, the respondents have conceded that it was delivered by the settlor, not as an escrow, but as his deed. In my opinion, the concession was right, and, indeed, inevitable. Whether or not an instrument was delivered as an escrow is a question of fact. The old law, as stated in Sheppard's Touchstone, p. 58, that an instrument could not be held to be an escrow unless it was delivered with express words so declaring, and was delivered to some person other than the person executing it, has now been abandoned. The character of the act of delivery depends on intention, which must be ascertained by considering the nature and circumstances of the case. This is the effect of *Bowker* v. *Burdekin* (10) and *Xenos* v. *Wickham* (11). In this case, there are no circumstances which could justify a finding of fact that the instrument was delivered as an escrow. A

The issue of whether or not the first appellant disclaimed the deed is material only if there was something to disclaim—that is, if there was a valid and binding settlement of a beneficial interest in her favour. On both views taken in the Court of Appeal, it is clearly not a material issue, though it might perhaps be material to ascertain if she effectively B refused the benefit of the settlement. Her disclaimer could only affect her life interest. Thus, her disclaimer would not by itself entitle the respondents to succeed in the appeal, because it would not affect the rights of the second appellant, the infant, assuming that the deed gave him rights. In addition, the respondents have stated throughout C that, if they do not succeed against the second appellant, they will not take the point that the first appellant was disentitled to relief. However, notwithstanding, I feel that it is right to determine the question whether or not the first appellant disclaimed the deed. The contention that she did has been much pressed on behalf of the respon- D dents, and she is entitled to have her position and rights vindicated. In my opinion, the issue of disclaimer should be decided in favour of the first appellant. That issue depends on analysing what passed between the settlor or his solicitors, on the one side, and the first appellant and her solicitors, on the other side. The respondents were not directly E concerned with that aspect of the facts. A careful consideration satisfies me that no disclaimer has been made out. Disclaimer of a deed has been rightly described as a solemn irrevocable act. If it is alleged, the court must be satisfied that it is fully proved by the party alleging it, who must also establish that it was made with full knowledge and F with full intention. In this case, I can find no evidence that the first appellant ever desired to disclaim. In fact, the judge has found, with abundant evidence, that from about the latter part of Nov., 1925, she was always willing to sign. If, in the end, she did not do so, it was because her will was overborne by the urgency of the counsel and G solicitors who advised her. They made her believe, much against her will, that it would be dishonourable and improper, as well as futile, to attempt to execute an instrument which, as they were led to believe, was merely an escrow. That this was their belief is clear, to my mind, from her solicitors' letter of May 16, 1927, which I cannot explain on H any other footing. The settlor's solicitors from some date late in 1926 were determined to get back the instrument without its being executed by the first appellant. I presume their intentions were of the best, but I cannot applaud their methods. The formula which they so persistently reiterated both to the solicitors of the respondents and

to those of the first appellant—namely, that there was no settlement, but merely a proposal for a settlement by the settlor, which he had revoked—obviously had a convincing effect at the time on both the solicitors of the appellants and those of the respondents. In my opinion, however, what the first appellant did cannot, in the circum-
A stances, be construed as a disclaimer of the settlement, and, in any event, even if it were, could not be held to be binding, because she clearly acted under a material mistake. There is a further difficulty in the respondents' way on this point. As I understand the facts and the findings of the judge, the first appellant accepted the settlement in
B Dec., 1925, at a personal interview with the settlor, and arranged the difficulty or complaint raised in her solicitors' letter of Nov. 16, 1925, which I cannot construe as a repudiation or rejection of the settlement. It was old law that a deed, once accepted, cannot be disclaimed (SHEPPARD'S TOUCHSTONE, p. 70), and I see no ground to think that
C the rule has been changed. It seems to me to be a sound rule. If either party desires at a later date to get rid of the deed, or to divest any estate or interest conveyed by it, that object must be achieved by some procedure between the parties other than disclaimer.

I pass to the crucial question, which is what the effect of the deed
D was. That must depend on the effect of the deed either in law or in equity. Its construction in law must first be determined, even though, as in this case, the deed deals with an equitable interest. Equity follows the law, and, when it interferes, does so to qualify or modify the rights or liabilities which would flow from the legal construction
E of the deed. A deed may, no doubt, be subject to conditions expressed in it. Thus, a deed may contain executory reciprocal conditions, as to which questions may arise whether they are dependent or independent, whether a breach excuses performance or whether it merely gives a claim for damages. A deed which is a grant or settlement may contain
F conditions precedent to the passing of the property, or conditions subsequent or resolutive providing for a divesting of the interest conveyed. Where, however, there is an absolute and unconditional settlement, it takes effect at once by the act of the settlor's executing it. This is complete when he delivers it as his deed. I disregard the possible
G effect of fraud or similar matters which may be availed of in proper cases to nullify the act of execution, and I disregard any question of disclaimer. The absolute settlement is as immediately effective as is a completed gift of a chattel at law or an oral declaration of trust in equity. Questions of consideration are in this connection irrelevant.
H As LORD ELDON, L.C., tersely said of deeds in *Cock* v. *Richards* (12), at p. 438, "Consideration is not necessary." The settlor or obligor, once the deed has been delivered by him as his deed, cannot revoke it: *Butler & Baker's Case* (13) and *Xenos* v. *Wickham* (11). One of the clearest and most striking statements and applications of these principles is to be found in *Bowker* v. *Burdekin* (10), where a partner executed a

deed conveying to a trustee for the benefit of creditors all the personal property of the partners. He was held bound by it though it was clear that he only executed it on the footing that the other partners would also execute it, which they failed to do. However, there was not an express condition to that effect. Parke, B., said that an instrument executed as a deed cannot be denied its effect for transferring property according A to its terms. If these principles are applied to the deed in question, it seems to be clear that its terms involve an unconditional settlement.

In the opinion of Scott and Clauson, L.JJ., however, that is not its true effect in law. In their view, it was not intended to be a unilateral declaration of trust which would have effect whether or not the first B appellant executed it, but was to be construed as a consensual document, requiring for its operation that the first appellant should concur in it by executing it. This criticism is not, as I follow it, based on any express condition precedent. Clearly there was none. It is based on an argumentative interpretation of the deed which presupposes that C its intention was to create the trust only if it superseded the obligations under the deed of covenants of 1923, and that this supersession could only be effected by the execution of the deed by the first appellant. The declaration of trust was to bind the settlor only when the deed was executed by the other party, the first appellant, and, until that D happened, the position was analogous to that which arises when one party makes a written offer to another party and the latter does nothing more. There, it is said, there is no acceptance, no consensus, and no legal result. It seems to be assumed that there was some time limit within which execution was to take place, or perhaps it had to take E place before the date of the writ or counterclaim. Counsel for the respondents showed themselves somewhat reluctant to uphold this view of Scott and Clauson, L.JJ., but I think that I have stated it with sufficient accuracy. I find it quite impossible, with all respect, to agree with it. The deed might well have been drawn in such a way as expressly F to make the declaration of trust conditional on the first appellant executing it. In that case, it would not have taken effect unless she had done so. However, there is nothing of the sort expressed in the deed. On the contrary, the declaration of trust is absolute and unconditional in terms. It may have been expected that the first appellant would G execute the deed, but it was certainly not made a condition of the settlement. In my opinion, the settlement was unilateral. I think it is misleading to import into the law of deeds analogies from an entirely different region of law—namely, that of simple contracts. They, indeed, are consensual, and depend on a meeting of minds in a common intent, H evidenced by words or conduct. It is from this mutual consent that the rights and duties under the agreement arise. This might be the position in a case of a simple agreement to convey property, but the deed in question is something different. The declaration of trust by the settlor depended, not on the other party's consent, any more than on mutual consideration, but on an act of the settlor in executing the settlement. The beneficiary might, it is true, disclaim, but her acceptance was immaterial, except, perhaps, as ruling out disclaimer. There is nothing in the deed which could be construed as an express condition, and no legal principle on which a condition such as is suggested A could be implied. The law as to obligations or transfers under seal was fixed in days before the nature of the consensual contract was realised. In my judgment, the views of SCOTT and CLAUSON, L.JJ., cannot be supported.

On the other hand, SIR WILFRID GREENE, M.R., took a different B view. He did not find on the true construction of the deed, any condition in law. He held that, immediately on execution by the settlor, in law the settlement was completely constituted in favour of the appellants, but he went on to deal with what he described as a different matter altogether, and found that the deed was clearly executed by C the settlor on the faith that the first appellant would also execute it. He then proceeded to hold that, because she had not, it was not binding on the settlor in favour of either the first or the second appellant. The deed was never binding at all, because equity would relieve against it. While he did not, at least primarily, base this conclusion on the D equitable principle which he found to be expressed by SIR GEORGE JESSEL, M.R., in *Luke* v. *South Kensington Hotel Co.* (4), at p. 125, which has been quoted by my noble and learned friend LORD RUSSELL OF KILLOWEN in his opinion, I think he was proceeding on some such principle. In *Luke's* case (4), the *dictum* was unnecessary to the decision E of the case, and is not referred to by JAMES, L.J., who was the other member of the court who gave judgment. The *dictum* is stated by SIR GEORGE JESSEL, M.R., in terms too broad and general to be of any service. Nor is that vagueness and indefiniteness cured by considering how it was applied in the particular case, because it could have no F application to the facts of that case. There are, however, earlier decisions, which have been cited to your Lordships, in which an equitable principle is laid down for giving relief against the strict construction of a deed at law. That there is some such principle in equity I do not doubt, however reluctant as a common lawyer I may be to weaken G the legal effect of the solemn undertaking involved in a conveyance or covenant under seal. The principle, however, is necessarily of limited application, as the cases show. What its precise limits are I do not seek to fix. A doctrine of this kind must always be somewhat elastic to fit the special equities of the particular case, but I am clear that, H however understood, it cannot affect this appeal. Certain things seem clear. The word "faith" is not, perhaps, very happy. In some of the cases, the word "assumption" or "understanding" has been used in this context. "Faith" is clearly not used in a theological sense. Nor can it mean a mere intention or expectation in the settlor's mind. It need not necessarily be proved by extrinsic evidence, such as a prior

agreement, but may be inferred from the nature of the transaction as known to both parties. The expectation or intention so inferred must be such that its failure—for instance, by reason of the absence of execution by the other party or parties—makes the transaction substantially different from what it would have been if the parties had
executed. Thus, in *Evans* v. *Bremridge* (7), the Lords Justices, affirming A
the decision of Page Wood, V.-C., held that the intention of the transaction was that two joint and several co-sureties should execute, whereas only one did. They held that the lender could not enforce the deed according to its legal effect as against the one who executed.
In the words of Turner, L.J., it was not a matter of indifference to B
him that the intended co-surety did not execute. If the covenant had been enforced against him, he would have been charged on a contract into which he did not enter. By way of contrast, the equitable relief was refused in *Cooper* v. *Evans* (9) to joint and several sureties who
claimed that they had executed the deed on the faith of its being executed C
by the principal debtor. This failure to execute, however, did not change the substance of the transaction. The sureties could not, it was true, directly treat him as a specialty debtor on that deed, but they could treat him as a specialty debtor indirectly by being subrogated
on payment to the creditor's rights against him, and these rights were D
by specialty. I need not refer in detail to other authorities, such as *Bolitho* v. *Hillyar* (14) or *Peto* v. *Peto* (15), which were cases of family arrangements, but which proceeded on the same principle that the absence of the parties who did not execute changed the substance of
the transaction. The same test was applied in *Re Dover, Hastings & E
Brighton Junction Ry. Co., Carew's Case (*No. 2*) (6), a case in which the director and subscribers of a company were concerned. These cases all deal with non-execution by a person named in the deed as being intended to execute it, where his failure to execute materially affected
the substance of the transaction. F

It seems to me impossible to apply any such principle to the present case where the substance of the transaction is not changed by reason of the fact that the first appellant did not execute the deed. It is true that she was not a party to the deed, nor did she grant a release under
seal if she did not execute it, but she could not enforce the deed or accept G
its benefits without binding herself to accept any reciprocal burden which its terms imposed on her. It is true that, if she did not execute, she was bound only as a promisor, not as a covenantor, but that, in my opinion, did not go to change the substance of the transaction.
By the mere fact of her accepting, as I think she did, the benefits under H
the deed, she promised and agreed to release the former deed of covenants in accordance with cll. 16 and 17 of the deed. The substance of the matter is the transfer of the beneficial interest. This is not subject in terms to her executing the deed, and her failure to execute did not, in my opinion, raise any equity. If the settlor wanted her execution

as a condition precedent to the declaration of trust, he should have inserted an express condition to that effect. Furthermore, in the event of her non-execution, he could, in a proper case, have claimed an order against her to execute. In my opinion, however, her failure to execute was, both in fact and in law, a matter of indifference to him. There is no ground for saying that he executed the deed on the faith or assumption that the first appellant would execute. That idea was an afterthought. The same conclusion might be reached from a different line of argument. In the cases to which I have referred, the person who did not execute was neither plaintiff nor defendant. He was contemplated as a necessary party, but, because he did not execute, he never became a party to the instrument. The party who claimed the equity did so on the ground that he was subject to a greater burden because the other person, his intended co-surety, did not execute. In the present case, the first appellant, by claiming to enforce the settlement, put herself in the same position, for all practical purposes, as if she had executed, and the settlor was not prejudiced in fact, because the release became effective when the first appellant accepted the benefits under the deed. For these reasons, which deal with the substance of the matter, I find myself, with all deference, unable to see eye to eye with Sir Wilfrid Greene, M.R. I have not thought it necessary to pursue various subsidiary difficulties which, it seems to me, would arise on his view. In the result, the settlement is and has been effective in favour of both appellants, as your Lordships have already decided.

Lord Romer: My Lords, I have had the privilege of reading beforehand the opinion of my noble and learned friend Lord Russell of Killowen. I agree with it so entirely that I venture to add a few words of my own only out of respect for the Court of Appeal, with whose decision I felt myself constrained to disagree. The conclusion arrived at by the members of that court was unanimous, but they reached it by different paths. Sir Wilfrid Greene, M.R., agreeing so far with Morton, J., was of opinion that the deed executed by the settlor in Aug., 1925, was sufficient, in the circumstances, to create an immediate and complete trust, notwithstanding the fact that it was not then executed by the female appellant. He thought, however, that her subsequent failure to execute the document entitled the settlor to treat the settlement as no longer effective, upon the principle enunciated by Sir George Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.* (4), at p. 125. He was also of opinion that the female appellant had disclaimed, and so put an end to the trusts thereby declared in favour of both appellants. Scott and Clauson, L.JJ., on the other hand, regarded the deed as being in effect no more than an offer made by the settlor to the lady to make a settlement upon her and the infant appellant in the terms which are contained in it. Referring to the deed, they said, at p. 663:

> . . . the crucial question is whether cl. 1 is intended to—or, indeed, can—on its

> true construction operate as though it were a unilateral declaration of trust by the settlor. In our judgment, it does not bear such a construction. Taken in conjunction with the recitals and the testatum and the remaining clauses of the deed, and in particular cll. 16 and 17, cl. 1 operates, in our view, to create a trust by the consensus of the settlor . . . and the female defendant, her consensus in the creation of the trust and the contemporaneous release of the pre-existing trust, being requisite in order to perfect the transaction, which appears on the face of the document to be the creation of a trust by way of supersession of a previous trust, such previous trust to be brought to an end by the concurrence of the female defendant in the deed.

It is, I think, plain that in forming this view of the deed in question SCOTT and CLAUSON, L.JJ., must have regarded the settlement which it purported to effect as not being such a settlement as was contemplated by cll. 4 and 5 of the deed of covenant of Feb. 1, 1923, and, therefore, as being one which would not operate as a satisfaction of the settlor's covenants without the consensus of the female appellant. In this I think, with all deference, that they were wrong. It is true that the deed of Aug., 1925, did not secure to the lady an annuity during her life, for the annuity determined upon alienation, but so did the weekly sum payable under the deed of covenant. The trust for payment to her of the annuity under the deed of Aug., 1925, did not, therefore, contain anything repugnant to the preceding text referred to in cl. 5 of the deed of covenant. In my opinion, a settlement in the terms of the deed of Aug., 1925, was one which would bring about a " supersession of the previous trust " without any consent or concurrence on the part of the lady. The settlement effected by that deed was, in my judgment, intended by the settlor to be, and was in fact, a unilateral declaration of trust by him. I cannot otherwise understand why cll. 4 and 5 of the deed of covenant were recited. The recital of them would have been altogether out of place in a settlement intended to operate as an agreement between the parties.

However, the female appellant was made a party to the deed of settlement, and was so made for the purpose of expressly releasing the settlor from liability under the deed of covenant in consideration of the settlement which he was making. What effect, then, did her failure to execute the deed have upon the settlor's declaration of trust ? In my opinion, it had none. The general rule at common law as to non-execution of a deed by one of the parties is quite clear. In SHEPPARD'S TOUCHSTONE, it is stated as follows :

> If there be divers grantors obligors etc. named in a deed and one of them only do seal the deed, this is a good deed as against him that doth seal and void as to all the rest that do not seal.

In *Morgan* v. *Pike* (1), it was accordingly held that a covenantee who was a party to an indenture might sue the covenantor who executed it, although he himself had not executed it, and notwithstanding the fact that there were cross-covenants on the part of the covenantee which formed part of the consideration for the covenants on the part of the covenantor.

In equity, however, an exception has been engrafted upon the common law rule, and one of the questions to be decided upon this appeal is whether the present case falls within that exception. SIR WILFRID GREENE, M.R., as I have already stated, held that it does, treating the exception, as perhaps he was bound to treat it, as having been correctly enunciated by SIR GEORGE JESSEL, M.R., in *Luke* v. *South Kensington Hotel Co.* (4). What SIR GEORGE JESSEL, M.R., said was this, at p. 125:

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> It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute . . .

My Lords, with all respect to that great judge, this statement of the equitable principle is expressed far too widely. He does not mention B the authorities by which the principle as enunciated by him had been well settled, and, for myself, I know of none. The authorities most in point are *Underhill* v. *Horwood* (5), at p. 225, *Evans* v. *Bremridge* (7) and *Re Dover, Hastings & Brighton Junction Ry. Co., Carew's Case (No. 2)* (6), none of which appears to have been cited to SIR GEORGE C JESSEL, M.R. The equitable principle which they lay down is that, where, owing to the non-execution of a deed by one of the parties, the others who have executed it would, by the application of the common law rule, be bound by a covenant or transaction different in kind from that which it was their intention to enter into, they can be relieved in D equity from the results of their execution of the deed. The cases which most commonly call the principle in aid are those in which a covenantor executes a deed with the intention of binding himself jointly with another party to the deed but, owing to the non-execution of the deed by that other party, finds that he alone is bound at common law. Equity will, E where such intention is sufficiently shown, relieve the covenantor from his liability. The principle is not confined to such cases, however. In the very case with which SIR GEORGE JESSEL, M.R., was dealing, a deed had been prepared by which three trustee mortgagees purported to release the mortgagor and the mortgaged property from the mortgage debt. F Two of the trustees executed the deed. The third trustee refused to do so. It was argued, however, that the effect of the deed was to release the debt at law, and it was this argument which was refuted by SIR GEORGE JESSEL, M.R., in the passage cited. He held that the deed did not bind the two trustees who had executed it. They would otherwise have been G held bound by a transaction into which they never intended to enter. The only transaction which they intended was plainly one under which all three trustees concurred in releasing the mortgage debt. The case fell directly within the limited equitable principle established by the earlier authorities to which I have referred. It was not, therefore, necessary H to extend the principle for the purpose of the decision, and it is plain that SIR GEORGE JESSEL, M.R., in no way intended to do so. His judgment, like all other judgments, must be construed in reference to the question which had to be decided, and, so construed, it should not, in my opinion, be regarded as an authority governing the case which was before your Lordships' House.

Upon the question whether the first appellant disclaimed the trusts in favour of herself and the second appellant, I cannot usefully add anything to what has fallen from my noble and learned friend Lord Russell of Killowen. It was for these reasons, in addition to those given by my noble and learned friend, that I concurred in the motion for the restoration of the order made by Morton, J. A

Appeal allowed with costs.

Solicitors: *Bircham & Co.* (for the appellants); *Murray, Hutchins & Co.* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*] B

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD. C

[King's Bench Division (Atkinson, J.), **February 8, 9, 13, 1940.**]

Insurance—Motor insurance—Third-party risks—Extension of protection—Indemnity of authorised driver while driving against liability "in respect of any claim by any person including passengers"—Claim by policyholder—Road Traffic Act, 1930 (*c.* 43), *ss.* 35 (1), 36 (1) (*b*), (4). D

The claimant was the chauffeur employed by the owner of a car. In a collision, the owner was injured, and, in proceedings in respect of that accident, she recovered damages against the chauffeur. The chauffeur thereupon claimed that he was entitled to be indemnified against the sum awarded as damages by the respondent insurance company under a policy issued by them to the owner. By the policy, E in a section with a marginal heading "Third Party Liability" the insurance company undertook to indemnify the policyholder against all sums which the policyholder should become legally liable to pay in respect of any claim by any person (including passengers in the car) for loss of life or accidental bodily injury or damage to property caused by, through or in connection with the car. The insurance was to extend to indemnify in like manner any person driving the F car on the order or with the permission of the policyholder, and it provided that such person should as though he were the policyholder observe, fulfil and be subject to the terms, exceptions and conditions of the policy, in so far as they could apply. The policy contained the usual arbitration clause. It was contended that the extension of the insurance was not an extension of the class of claimants and that, G therefore, the policyholder could not be a claimant under the policy:—

Held: (i) the chauffeur was entitled under the policy to be indemnified against the damages awarded to the policyholder against him.

(ii) the chauffeur was bound by the arbitration clause.

[**EDITORIAL NOTE.** The substance of this case is whether or not the policyholder can be called a third party within the meaning of those words as used in the policy H of insurance where the claim is made by the insured person. The decision, of course, is based upon the particular wording of the policy, but the wording here in question follows the general form of wording used in such cases.

As to Extension of Protection, see HALSBURY, Hailsham Edn., Vol. 18, pp. 558, 559, paras. 901-903; and for Cases, see DIGEST, Vol. 29, p. 408, Nos. 3214-3217.]

Cases referred to :

(1) *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*, [1933] A.C. 70 ; Digest Supp. ; 102 L.J.P.C. 21 ; 148 L.T. 169.

(2) *Williams* v. *Baltic Insurance Assocn. of London, Ltd.*, [1924] 2 K.B. 282 ; 29 Digest 408, *3215* ; 93 L.J.K.B. 819 ; 131 L.T. 671.

(3) *Guardian Assurance Co., Ltd.* v. *Sutherland*, [1939] 2 All E.R. 246 ; Digest Supp.

(4) *McCormick* v. *National Motor & Accident Insurance Union, Ltd.* (1934), 50 T.L.R. 528 ; Digest Supp.

(5) *Hamilton & Co.* v. *Mackie & Sons* (1889), 5 T.L.R. 677 ; 2 Digest 331, *138*.

(6) *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.*, [1912] A.C. 1 ; 2 Digest 331, *141* ; *affg.* S.C. *sub nom. The Portsmouth*, [1911] P. 54.

(7) *Royal London Mutual Insurance Society* v. *Barrett*, [1928] Ch. 411 ; Digest Supp. ; 97 L.J.Ch. 177 ; 139 L.T. 208.

(8) *General Accident, Fire & Life Assurance Corpn., Ltd.* v. *Watson*, unreported.

(9) *Tattersall* v. *Drysdale*, [1935] 2 K.B. 174 ; Digest Supp. ; 104 L.J.K.B. 511 ; 153 L.T. 75.

(10) *Dennehy* v. *Bellamy*, [1938] 2 All E.R. 262 ; Digest Supp.

(11) *Freshwater* v. *Western Australian Assurance Co., Ltd.*, [1933] 1 K.B. 515 ; Digest Supp. ; 102 L.J.K.B. 75 ; 148 L.T. 275.

CASE STATED by an umpire in an arbitration for the opinion of the court regarding the construction of the terms of a policy of motor insurance. The facts are fully set out in the judgment.

H. U. Willink, K.C., and *Montague L. Berryman* for the respondents.

H. D. Samuels, K.C., and *R. Armstrong-Jones* for the claimant.

Willink, K.C. : The words " claim by any person " in sect. 2 (1) of the policy do not include the policyholder. There is unlimited indemnity in respect of claims against the policyholder by the public, and an indemnity to an authorised driver on like terms. " Any person " must exclude the insured. The insurance of the driver is not an independent insurance. The insured cannot be a third party in respect of the policy issued to her by the corporation. The statutory right to indemnity is only on the terms of the policy. [Counsel referred to *Guardian Assurance Co., Ltd.* v. *Sutherland* (3).] As to the arbitration clause, none of the conditions is aptly phrased to apply to an arbitration between an authorised driver and the corporation. The claimant cannot take advantage of the clause. [Counsel referred to *Williams* v. *Baltic Insurance Assocn. of London, Ltd.* (2), *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (1), *McCormick* v. *National Motor & Accident Insurance Union, Ltd.* (4), *Tattersall* v. *Drysdale* (9), *Guardian Assurance Co., Ltd.* v. *Sutherland* (3), *Hamilton & Co.* v. *Mackie & Sons* (5), *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.* (6) and *Royal London Mutual Insurance Society* v. *Barrett* (7).]

Samuels, K.C. : The words " claim by any person " are wide enough to include a claim by the policyholder. A third party is anyone who has a legal claim. It means all sums which an authorised driver shall become legally liable to pay. If it meant anything short of this, it would not comply with the statute. If the words of the policy are ambiguous, they are the corporation's own words, and should be construed against them in case of doubt. Any claim against the claimant must be by a third party as between him and the corporation. The definition of third party in the statute supports this argument. [Counsel referred to *Dennehy* v. *Bellamy* (10) and *Freshwater* v. *Western Australian Assurance Co., Ltd.* (11).]

ATKINSON, J.: By a policy of insurance, dated Oct. 27, 1936, the General Accident, Fire and Life Assurance Corporation agreed, among other things, to indemnify Miss Thompson (better known as Miss Merle Oberon) against third-party liability for accidents arising out of the use of her motor car. The policy also purported to indemnify authorised drivers in like manner. There was a condition in the policy requiring differences between the policyholder and the corporation to be referred to arbitration and making an award a condition precedent to any liability.

The claimant in this arbitration is Miss Thompson's chauffeur. He was admittedly an authorised driver within the terms of the policy. On Mar. 16, 1937, while Digby was driving the car, Miss Thompson being in the car, an accident occurred in which she sustained personal injuries. Her car collided with another car. She brought an action against those responsible for the driving of the other car. The defence attributed the blame to Miss Thompson's driver, Digby, and he was, therefore, joined as a defendant. Ultimately it was held that Digby was alone to blame, and Miss Thompson recovered judgment for £5,000 damages and costs against him. Digby then claimed to be indemnified by the corporation. On Dec. 1, 1938, the corporation delivered their points of defence. Para. 4 raised the point that the plaintiff was not a party to the policy, and not entitled to sue upon it, and para. 5 said:

> Alternatively, the defendants say that if the plaintiff can in law take proceedings against them under or in respect of the said policy, such proceedings can only be by way of arbitration as provided for by condition 8 of the said policy, under the terms of which condition the obtaining of an award in such arbitration proceedings is a condition precedent to any liability of the defendants under the said policy, or of any right of action against the defendants.

Para. 7 said:

> In the further alternative and without prejudice to the matters set forth in paras. 4, 5 and 6, the defendants say that the said Thompson was not a "third party" within the meaning of the contract of insurance and deny that the terms of the policy extend to indemnify the plaintiff in respect of his alleged liability to the said Thompson under the terms of the said judgment.

The claimant's advisers thought that the plea in para. 5—namely, the plea that proceedings could only be by way of arbitration—was a good one, and on Feb. 3, 1939, on his application, an order was made staying the action in terms that he paid the costs of the corporation. On Apr. 6, 1939, the claimant appointed an arbitrator and, by notice, called upon the corporation to appoint their arbitrator. By a letter, dated Apr. 18, the solicitors to the corporation wrote that they were instructed to accept service, and so on, and said:

> We, as you are aware, deny the right of your client Mr. Digby to arbitrate under

the policy and this acceptance of service and any subsequent procedure on our clients' behalf is and will be without prejudice to and whilst reserving our clients' rights in the above connection.

On Apr. 24, the respondents appointed their arbitrator, equally without prejudice—and it is not suggested that they prejudiced their rights in any way by doing that—and ultimately Mr. Maxwell Fyfe was appointed umpire. There were two matters in dispute—namely, (i) whether or not the dispute was within the arbitration clause, and (ii) whether or not the claim by Miss Thompson against the claimant was a third-party claim within the indemnity given by the policy to an authorised driver. The arbitration took place, and by agreement the umpire stated his award in the form of a special case, raising for the opinion of the court the following two questions:

> (1) Whether, on the facts and circumstances which happened as hereinbefore set forth, the claimant is entitled to avail himself of the arbitration provided for in the policy: (2) Whether, on the assumption that he is so entitled to avail himself of such arbitration, the claimant is entitled to recover the sum of £5,693 1*s.* 9*d*.

The award proceeded to award in favour of the claimant on both questions if neither party set down the case for argument within the time appointed. The case was set down, and was argued with conspicuous clarity, and all that remains for me is to express my opinion on the points raised.

The relevant parts of the policy are as follow:

> Now this policy witnesseth that in consideration of the payment to the corporation of the premium . . . the corporation will, subject to the terms, exceptions and conditions contained herein, and of any indorsement hereon, indemnify the policyholder in respect of any automobile described in the schedule against . . .

Then I pass to sect. 2, where, in the margin under the words "sect. 2," appear the words "Third Party Liability." The relevant part of the section is as follows:

> (1) All sums which the policyholder shall become legally liable to pay in respect of any claim by any person (including passengers in the automobile) for loss of life or accidental bodily injury or damage to property (including animals) caused by, through, or in connection with such automobile . . . (3) The insurance under this section shall also extend to indemnify in like manner any person whilst driving any automobile described in the schedule hereto on the order or with the permission of the policyholder, provided there is no other insurance subsisting under which such person may be indemnified, and that such person shall as though he were the policyholder observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply . . .

The next heading of importance is "Emergency Treatment," and that is followed by a proviso, which is not a proviso to the emergency treatment clause, but, I think, a proviso with reference to sect. 2, the third-party liability section:

> Provided that the corporation shall not be liable in respect of: Death of or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by the policyholder.

I think that that is all which is relevant there. Then, when I come to the conditions, there are 11 conditions. I think that the only one of importance is condition 8:

> If any difference shall arise between the policyholder and the corporation, such difference shall be referred with all usual powers to two arbitrators mutually chosen

> or their umpire, or to one arbitrator if the policyholder and the corporation shall so agree, and an award shall be a condition precedent to any liability of the corporation or any right of action against the corporation.

Before the Road Traffic Act, 1930, the provision for extended insurance was of very doubtful value. That extended provision, of course, conferred no benefit on the policyholder, and the persons it purported to benefit, not being parties to the contract, could not claim under it. That, I think, was finally decided in *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (1). Roche, J., in an earlier case, *Williams* v. *Baltic Insurance Assocn. of London, Ltd.* (2), had in that particular case, and on that particular policy, found a way of giving effect to it by permitting the policyholder to recover as a trustee for a person within the extended provision. However, I do not think that that case was regarded with any particular favour in *Vandepitte's* case (1), because in *Vandepitte's* case (1), referring to *Williams*' case (2), it was said, at p. 82:

> The facts in that case and the contractual terms were, however, different from those in question here and the provisions of the relevant statutes were not the same: nor is it clear whether the learned judge treated the driver of the car as directly insured or as a *cestui que trust*. Their Lordships have not been able to derive from that case any principles helpful to the issue now before the Board.

At any rate, that is enough to show that the value of this extended provision was very doubtful to the persons intended to be benefited.

Then came the Road Traffic Act, 1930. There are three provisions of importance which I must read. Sect. 35 (1) provides as follows:

> Subject to the provisions of this part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this part of this Act.

Then sect. 36 deals with the requirements, and subsect. (1) (*b*) reads:

> insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road.

Then sect. 36 (4) provides as follows:

> Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

The effect of sect. 36 (4) has been considered once or twice, but the most helpful case, I think, is *Guardian Assurance Co., Ltd.* v. *Sutherland* (3). There a person claiming indemnity within the extended benefit clause in a policy was met by the plea that the policy was voidable, on the ground that it had been obtained by fraud by the policyholder, and the insurance company took proceedings for a declaration to establish their right to avoid the policy even against an innocent claimant not a party to the policy, and they succeeded. The only part of the judgment to which I want to refer is where BRANSON, J., said, at p. 249:

> A policy obtained by misrepresentation of material facts insures no one.

I agree that that must not be taken too literally, because until it is set A aside I think it does. BRANSON, J., continues, at pp. 249, 250:

> and so cannot be held to be such a policy, and, therefore, subsect. (4) does not apply to a policy so obtained. To accede to Mr. Holmes' argument would be to hold that the legislature had deprived an insurance company which issues a policy under sect. 36 of its common law right to repudiate liability arising out of a policy, the granting of which has been induced by material misrepresentation. However, I am not left without authority.

B Then he refers to several cases, and reads a passage from the judgment of SCRUTTON, L.J., in *McCormick* v. *National Motor & Accident Insurance Union, Ltd.* (4). He then says, at p. 250:

> The effect of this paragraph can only be avoided by Mr. Holmes if he says that his action for indemnity is not upon the contract but upon the statutory right C conferred by the section. The section does not, in my opinion, impose any statutory liability upon the insurer. It only gives to " persons specified " a statutory right, which, apart from statute they did not possess, to sue upon the contract.

With great respect, I entirely agree with that view. It means that an authorised driver claiming by virtue of sect. 36 is claiming upon the D contract contained in the policy. Although not a party, by the statute he is given the right of a party, and can enforce only the obligations contained in the policy, and can enforce those obligations only subject to the conditions therein contained.

The first question is whether the arbitration clause applies to Digby's E claim. It will be remembered that the relevant words are:

> . . . and that such person shall as though he were the policyholder observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply . . .

The argument for the corporation is that, even if one reads condition 8 F into the contract made with Digby by the statute, a contract which he is seeking to enforce, it still refers only to differences arising between the policyholder and the corporation, and, therefore, does not cover differences between persons not policyholders and the corporation. Counsel for the respondents prays in aid the principle laid down in *Hamilton & Co.* G v. *Mackie & Sons* (5). The principle of that case was also approved and adopted in *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.* (6). Quite shortly, the point was this. In substance, a bill of lading contained a provision that all the terms and conditions of the charterparty were to be deemed to be incorporated in the bill of lading. That is not putting it in H the precise language, but that was the point. What was held there was that one must deal with the matter as if those clauses were set out *verbatim* in the bill of lading. It was dealing with an arbitration clause and, if one had it set out, the words would have been, " All dispute, under this charter shall be referred to arbitration," and, therefore, the clause would not cover any disputes under the bill of lading, even if one had that clause set out *verbatim* in the bill of lading. The argument of counsel for the respondents is: "So here, if one had that clause set out in the contract with the authorised driver, it would still read: 'if any difference shall arise between the policyholder and the corporation.'" I do not think that any argument on those lines is open to the corporation, in view of the words: A

> . . . that such person shall as though he were the policyholder observe fulfil and be subject to the terms exceptions and conditions of this policy . . .

It seems to me that it would be giving no effect whatever to those words to hold that he was not bound by this arbitration clause, and I think B also that it is extremely difficult for counsel for the respondents to get over the last words of the arbitration clause:

> . . . and an award shall be a condition precedent to any liability of the corporation or any right of action against the corporation.

In my judgment, a person bringing an action by virtue of that statutory C provision, bound by the terms of the contract on which he is permitted to sue, is bound by that clause, and has a right to invoke its aid. Therefore, I answer the first question in the affirmative, and I am sure that it will be a matter of satisfaction to those controlling the business of this corporation that my decision saves them the mortification of having D obtained the discontinuance of the action brought against them, and payment of their costs by Digby, by setting up an ill-founded plea as to the meaning of their own policy.

On the second question, the argument for the corporation is this. By sect. 2 (1), the policyholder is to be indemnified against all sums E which she becomes liable to pay in respect of any claim by any person other than the parties to the contract. The expression "third party" means, it is said, a person outside the contract, a person other than the two contracting parties, and, therefore, the policyholder, if injured, cannot claim indemnity under that subsection, because the policyholder cannot F be a third party. Further, of course, Miss Thompson could not become liable to pay damages to herself. There is one case which I think throws light upon the meaning of the words "third party," and that is *Royal London Mutual Insurance Society* v. *Barrett* (7). It was not a policy of this kind which was in question, but the insurance company issued a G policy containing the following condition:

> The policy shall be void if the life assured dies by suicide or by the hands of justice. In any such case the directors may allow to the policyholder such part of the sum assured as they shall think fit, and the policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration . . . provided notice thereof in writing shall have been received . . . H

The company had advanced money to the assured on a mortgage of certain property and on an assignment to them of the policy by way of security, and it was provided by a clause in the mortgage deed that the company should satisfy themselves primarily out of the policy moneys. The assured committed suicide, and the company commenced an action against his executrix for the purpose of enforcing their security. The executrix said: "You must first satisfy yourselves out of the policy moneys, the money due on the policy, before you can come upon the leasehold property." It was held that the expression "third parties" did not include the assured. The relevant part of the judgment of TOMLIN, J., is at pp. 414, 415:

> Now, taking the question of the natural and primary meaning of the words, it seems to me that the third party there is a third party by reference to those who are concerned in the contract of assurance. In other words, I think the phrase means a third party with reference to the assurer and the policyholder, and possibly the assured, because the policyholder and the assured may conceivably be different persons. But it seems to me that it is impossible to say there that "third party" means "anybody other than the assured," or "anybody other than the policyholder," and that it therefore includes the assurer.

That is a decision to the effect that at any rate in that policy—and I do not see why the principle should not apply to this policy—a "third party" means somebody other than the two contracting parties. The words "any person" at the end of the first line in subcl. (1) cannot, therefore, include Miss Thompson, for the two reasons given by counsel for the respondents—namely, (i) that she could not be a third party under that, and (ii) that, of course, she could not sue herself. Then the argument continues that, when one comes to the first two lines of subcl. (3), the third party insurance under this subclause is merely an extension of the main insurance already defined and limited, and that it is an extension to include authorised drivers, but not an extension of the class of claimants against whose claims indemnity is to be given—namely, the class already defined as, and limited to, persons other than the policyholder and the insurers. In effect, the insurers are saying: "Persons not parties to this policy will normally be making claims against the owner, but there may be occasions on which they may be claiming against a person driving. Against claims by those persons, and those persons only, we indemnify both the policyholder and the driver." A claim by Miss Thompson against herself could not come within the indemnity in subcl. (1), as she is not a third party, and, therefore, it is said that a claim by Miss Thompson against Digby cannot come within subcl. (3). I think that that is stating the argument as I understand it.

Reliance was placed upon an opinion on a petition given by LORD ROBERTSON in *General Accident, Fire & Life Assurance Corpn., Ltd.* v. *Watson* (8). I gather that there is a procedure there by which points of law can be raised by petition, and a point exactly similar to this was raised there, and was decided as counsel for the respondents argues this case should be decided. The words in the policy which LORD ROBERTSON had to construe were different. There it was provided that the corporation would indemnify the policyholder against:

> . . . all sums which the policyholder shall become legally liable to pay in respect of . . . In terms of and subject to the limitations of and for the purposes of this section, the corporation will indemnify any person who is driving such motor car on the policyholder's order or with his permission.

In that case, dealing with the extended second indemnity, Lord Robertson said:

> The scope of the indemnity is not expressed. It is, however, an indemnity which is granted only "in terms of and subject to the limitations of and for the purposes of this section." For the ascertainment of its scope I think that one must look back to the main part of "this section." The main part of the section provides indemnity to the policyholder for any sums which she may become legally liable to pay in respect of, *inter alia*, "bodily injury to any person"; and the whole section is headed "Liability to Third Parties." I think it is plain (and it was not denied) that if the policyholder is personally injured she cannot directly claim indemnity under the main part of the section. She cannot become legally liable to pay damages in respect of injuries to herself. She is not, within the meaning of the main part of the section, a "person" against whose claims indemnity is provided. It is argued, however, that the subsidiary part of the section provides a completely independent indemnity for Miss Peggy Watson [the authorised driver]. That argument may be sound up to a point, but, since the scope of any such indemnity is determinable only by reference to the main part of the section and since the policyholder herself is not a person against whose claims an indemnity is provided by the main part of the section, I am of opinion that the scope of Miss Peggy Watson's indemnity does not extend to cover such claims. The contrary argument must proceed on the view that while the expression "any person" as contained in the main part of the section does not include the policyholder it must be construed as including her in any question as to the scope of the indemnity provided to Miss Peggy Watson by the subsidiary part of the section. I reject this argument. I see no imperative reason for changing the meaning of "any person," and I think that its proper meaning in terms of the contract is controlled by the heading of the section—"Liability to Third Parties."

It will be seen that the *ratio* of the decision is really contained in the words:

> . . . since the scope of any such indemnity is determinable only by reference to the main part of the section . . .

It is to be observed that the words are different in the policy I have to construe. They are [sect. 2 (3)]:

> The insurance under this section shall also extend to indemnify in like manner any person whilst driving any automobile . . . with the permission of the policyholder . . .

The words in the *Watson* case (8)—namely, "In terms of and subject to the limitations of and for the purposes of this section . . . will indemnify"—seem to me to be quite different. Those words plainly mean, I think, that the scope of the second insurance is to be no wider than the scope of the first. At any rate, there is the argument for the corporation.

Counsel for the claimant argued that the words I have to construe contemplate such an extension of the insurance as will indemnify the driver as completely as it indemnifies the policyholder, that the driver can only be indemnified "in like manner" if the same language is used of him as is used in sect. 2 (1) of the policyholder—namely, indemnify him against:

> All sums which [the driver] shall become legally liable to pay in respect of any claim by any person (including passengers in the automobile) . . .

The policyholder gets complete indemnity. Why is not the driver to get complete indemnity? Is he indemnified "in like manner" if he does not get complete indemnity? Further, he contends that "third-party liability " must be construed in relation to the person liable, that in the contract purporting to be made with an authorised driver, and upon which he is permitted to sue, " third party " means at any rate someone other than the driver, someone to whom the driver is liable in damages. Lord Robertson said that he saw no imperative reason for changing the meaning of the words " any person." Counsel for the claimant says that one cannot avoid a change on any view, and that an authorised driver must be within the definition of " any person " in subcl. (1). For example, supposing a friend is driving Miss Thompson, and Miss Thompson, suddenly startled, clutches his arm and causes him to lose control of the car and collide with something, then quite obviously the friend would have a claim against her. He must be within the phrase " any person " in subcl. (1), and yet he cannot be within the expression when incorporated in subcl. (3), as he can have no claim against himself.

After giving a good deal of thought to the case, I think that Lord Robertson was right when he said that it is always to be borne in mind that the dispute is as to the meaning of the particular contract. It is easy to go astray if one is unduly swayed by the construction put upon another and different contract. I think I must concentrate upon the language of this contract, and give it its natural and primary meaning. The mere fact that it may lead to a result not contemplated by the corporation is, of course, not material. The language is the language of the corporation, and, if there are two constructions equally reasonable, the one more favourable to the insured ought to be adopted. I think that counsel for the claimant is right when he says that subcl. (3) should be read as follows : " The insurance under this section shall also extend to indemnify an authorised driver while driving against all sums which he shall become legally liable to pay in respect of any claim by any person, including passengers." I cannot see why the words " any person " there should be given precisely the same meaning or scope as the same words in subcl. (1). As I have pointed out, the same meaning cannot be given. The authorised driver is not excluded from subcl. (1), and he is necessarily excluded from subcl. (3). I think that subcl. (1) gives complete indemnity to the policyholder, and I cannot see why subcl. (3) should not give complete indemnity to the driver. Weight must be given to the words " in like manner." It is as if the corporation said to the policyholder, " We will indemnify you against all claims which you may become legally liable to pay," and then, turning to the authorised driver, said, " And we will do the same for you." What does that mean ? It means : " We will indemnify you against all claims which you may become legally liable to pay." I am satisfied that the plain and natural meaning of the words is that the authorised driver is to be indemnified against all claims which he shall become legally liable to pay. The suing by an owner of her chauffeur, of course, is an unusual, and perhaps a startling, proceeding, but the same question would arise if a friend to whom the car had been lent, while driving up to the owner's gate in order to return the car, negligently ran into and injured the owner who was waiting to receive it. There would be nothing startling in a claim against the careless friend for damages, and I cannot see any reason why such a person should not be indemnified.

Then counsel for the claimant makes a further point that the friend in such a case would be the person using the car, because the owner would not be in it, and that he would be guilty of an offence under sect. 35 and sect. 36 (*b*) if not covered against claims in respect of bodily injury to any person. That is the statutory obligation. He is to be covered against claims in respect of bodily injury to any person. Miss Thompson, too, would be guilty of an offence in permitting her car to be used by a person not fully covered. I think that there is no doubt that the corporation intend policyholders and authorised drivers to believe that the policy gives them at least the protection which the law requires them to have, and it may be some consolation to the corporation that I have been driven to the conclusion that they have used apt words to give effect to what must have been their intention. Therefore, I answer the two questions in favour of the claimant, Digby.

Award confirmed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the respondents); *Walter, Burgis & Co.* (for the claimant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BLANKET *v.* PALMER.

[COURT OF APPEAL (MacKinnon and Clauson, L.JJ., and Farwell, J.), **February 16, 1940.**]

Emergency Legislation—Action for possession and rent—Order in effect reducing rent payable—Other trade creditors being paid in full—Discretion of court—Courts (Emergency Powers) Act, 1939 (c. 67), *s.* 1.

The appellant was the landlord of a shop in which the respondent carried on business. The premises were let to the respondent at a rent of £150 per annum, payable weekly at the rate of £2 17*s.* 8*d.* The respondent being in arrears with his rent, the appellant commenced proceedings to recover possession of the premises, and also to recover the arrears due. Judgment was given by the master for the appellant for £20 3*s.* 8*d.* arrears of rent, and for mesne profits and for costs, there being no defence. The respondent, however, asked for relief under the provisions of the Courts (Emergency Powers) Act, 1939, and leave to issue execution was suspended so long as the respondent paid £3 per week. The respondent appealed from the order of the master to the judge, who varied the order by directing that the respondent should pay the sum of £10 within 10 days and the sum of £1 10*s.* per week thereafter:—

HELD: in the circumstances of the case, the order of the master should be restored, and leave to enforce the judgment should be suspended only so long as the respondent paid £3 per week.

[EDITORIAL NOTE. This case, taken with the similar decision in *Metropolitan Properties Co., Ltd.* v. *Purdy* (3), might be thought to establish a principle that general trade creditors are not to be paid in full while the landlord is to be restricted in the recovery of his rent. Such a statement of principle has also received considerable support from the decision of the Court of Appeal in *A.* v. *B.*, [1939] 4 All E.R. 169; Digest Supp., but the decision herein is expressly stated to be a decision, not upon principle, but upon the particular circumstances of this case.

As to Leave to Issue Execution, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and for Cases, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Cases referred to:

(1) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

(2) *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q.B. 66; 31 Digest 553, *7004*; 66 L.J.Q.B. 532; 76 L.T. 815.

(3) *Metropolitan Properties Co., Ltd.* v. *Purdy*, [1940] 1 All E.R. 188; Digest Supp.

Appeal by the plaintiff from an order made by Cassels, J., varying an order made by Master Baker.

The appellant was the landlord of a lock-up shop let to the defendant for a period of 21 years under a lease dated Apr., 1935, and the action was brought to recover possession of the premises for non-payment of rent. The amount of the rent was £150 per annum, payable weekly at the rate of £2 17*s.* 8*d.* At the time when the proceedings were commenced, a little over £20 was owing, being 7 weeks' rent, and, at the time when judgment was given, on Jan. 16, 1940, a further £20 3*s.* 8*d.* was owing in respect of mesne profits. Judgment was given for possession and for the arrears of rent and for mesne profits to the date of the judgment, and an application was made at the same time for leave to proceed under the Courts (Emergency Powers) Act, 1939. The respondent put in an affidavit showing that his business had suffered by reason of the black-out, and asked for relief under the above Act. The master made an order to the effect that the appellant should have leave to enforce the order, but such leave was suspended so long as the respondent paid £3 per week. The respondent appealed to the judge, who varied the master's order by requiring the respondent to pay £10 within 10 days and reducing the weekly payments to £1 10*s.*, the respondent being left in possession.

Phineas Quass for the appellant.

Guy T. Aldous for the respondent.

Quass: The Courts (Emergency Powers) Act, 1939, was not intended to allow a tenant to continue in possession against the will of the landlord at a rent lower than that provided by the terms of the lease. The court has no power to compel a landlord to accept as current rent an amount lower than that provided by the lease. There is nothing in the Courts (Emergency Powers) Act, 1939, to differentiate the position of a landlord from that of any other creditor. No other person can be required to supply anything to a debtor at a price lower than the price he agreed to pay. *Evans* v. *Bartlam* (1) is authority for saying that, if the exercise of a judge's discretion works injustice, the matter can be raised in the Court of Appeal. The whole of the court's jurisdiction is concerned with the discharge of debts already crystallised. [Counsel referred to *Southport Tramways Co.* v. *Gandy* (2) and *Metropolitan Properties Co., Ltd.* v. *Purdy* (3).]

Aldous : It is contrary to the purposes of the Act to say that a tenant must necessarily leave if he is unable to pay the rent. The intention of A the Act is to provide that the tenant shall not be turned out if the court comes to the conclusion that that would not be right, because his inability to pay his rent has arisen by reason of circumstances arising from the war. The whole purpose of the Act is to prevent a tenant from being evicted by reason of his inability to pay the full rent. The judge has B found that the tenant's inability to pay the full rent is due to circumstances arising out of the war, and the discretion of the judge should not be interfered with unless it can be shown to have been exercised upon a wrong principle : *Metropolitan Properties Co., Ltd.* v. *Purdy* (3). In the present case, the discretion was exercised on a right principle, as it was C in accordance with the purpose of the Act.

Quass in reply.

MacKinnon, L.J. : This was a claim by the plaintiff, who was the owner of a shop where the business of supplying fried fish was carried on D by the defendant under a lease at a rent of £150 per annum, payable weekly at the rate of £2 17*s.* 8*d.* The defendant having got into arrears with his payment of rent, on Nov. 28, 1939, the plaintiff issued a writ claiming possession of this shop by reason of non-payment of rent, and claiming £20 3*s.* 8*d.*, being 7 weeks' rent due up to the day E before the issue of the writ. There was no defence to that claim, and on Jan. 16, 1940, judgment was given for possession. The judgment went on to say :

> . . . for £20 3*s.* 8*d.* rent and mesne profits from Nov. 27, 1939, the date hereof, at the rate of £150 per annum and £11 5*s.* costs.

F

In my view, as a matter of fact, that judgment was not in the form in which it should have been. Strictly, it should have been a judgment for possession and for £20 3*s.* 8*d.*, the rent due, and, as by a coincidence it so happened, for the same amount—namely, £20 3*s.* 8*d.*—mesne profits from Nov. 27, 1939, until Jan. 16, 1940, and for further mesne G profits at the same rate—namely, £2 17*s.* 8*d.* per week up to the time of obtaining possession. That, I think, would have been the form in which the judgment ought to have been drawn up.

Whatever the form of judgment was, however, it was necessary for the plaintiff, under the Courts (Emergency Powers) Act, 1939, to apply H for leave to issue execution to enforce the judgment. Application was made to Master Baker, who ordered as follows :

> It is ordered that the plaintiff be at liberty to sign final judgment . . . and it is further ordered that the plaintiff be at liberty, under the Courts (Emergency Powers) Act, 1939, s. 1, to issue execution, but that such leave be suspended so long as the defendant pays £3 per week, the first payment to be made on Jan. 21, 1940.

I have no doubt whatever of the intention of the master in making that
order, but here again I think that the form of order was inaccurate or
undesirable. I think that the order should have been: "Leave to issue
execution to enforce the aforesaid judgment, but such leave to be
suspended so long as the defendant pays £3 per week, such payment to
A be treated, as to £2 17*s*. 8*d*., as payment of the accruing mesne profits,
and, as to 2*s*. 4*d*., as payment off of the amount due under this judgment."
That, however, is a mere matter of detail.

The defendant appealed from that decision to the judge, and the judge
varied the order of the master by varying the direction for satisfaction
B of the judgment to a direction that the defendant do pay to the plaintiff
the sum of £10 on Feb. 5, and the sum of £1 10*s*. each week thereafter,
and that either party do have liberty to apply. As there was in existence
a judgment for possession in addition to a judgment for £20 3*s*. 8*d*. rent,
and a judgment for mesne profits at the rate of £2 17*s*. 8*d*. per week until
C possession was given, the effect of the judge's order is that that possession
could never be secured so long as the defendant paid £1 10*s*. per week,
and, so long as the defendant paid £1 10*s*. per week, he, the defendant,
is to remain in possession of this shop of which the lease is terminated by
the order for possession to be given up to the plaintiff. The result of
D that order is that in effect the contractual rights of the parties are
drastically altered. Whereas by those contractual rights the defendant
was liable to pay £2 17*s*. 8*d*. per week, by virtue of the order of the judge
he is now left in possession of the premises as though he were a tenant
there at an agreed rent of £1 10*s*. per week.

E Various questions have been debated before us, some of which raise
very difficult questions of principle as to the application of this Act.
Counsel for the appellant has suggested that it is not within the powers
of the court in any circumstances thus to vary the contractual rights of
the parties by reducing the amount of the rent reserved under the lease
F to a smaller figure. Counsel for the respondent says that that clearly is
within the powers of the court. I do not express any opinion upon that
question of principle. So wide and so vague are the terms of the Act
that my present impression is that it is quite conceivable that it might
be within the power of the court to order almost anything in variation,
G or in defiance, of the existing contractual obligations of the parties.

I think, however, that it is sufficient in this case to confine myself to
the facts of this case. This is not a case, such as was suggested by
counsel for the respondent, of the wife of a soldier being turned out of
her home, or anything of that sort. This is a case of business premises.
H At this shop a business is carried on for the profit and advantage of those
concerned in the business. Towards that business, the plaintiff supplies
the premises, as landlord. The defendant supplies the energy in managing
the business, buying the raw materials and other supplies, attending to
the customers, and so forth. Various fish merchants, potato merchants
and others are another element in the carrying on of the business. They

have to be paid by the defendant their proper market rate for what they supply. Under this decision of the judge, the only one person of all these various contributors to the carrying on of this business who is to be deprived of his share of the profits of carrying it on is the plaintiff, the landlord. The plaintiff presumably knows her own interest. If it were not likely that she could let, or if it were impossible for her to let, this shop to somebody else at a rent which the defendant ought to be paying to her, she would not take these present proceedings to get possession of the premises and take them over. It would be better for her, if she could not get the proper rent elsewhere, to let the defendant remain there, and get as much as she could out of him. The fact that she is asking for possession shows, *prima facie*, that this is a business interest of sufficient value for somebody else to pay the rent if the defendant does not. In those circumstances, looking at it from that point of view, I think that the order made by the master was the proper order to be made in this case, and I do not agree with the variation of it which was made by the judge.

I think, therefore, that the appeal should be allowed and the order of the master restored, but I think also that the several amendments of the proceedings which I have indicated should be made—namely, that the judgment should be rectified so as to read it in the form which I recited, and that the order of the master should also be varied or rectified by putting it in the form: "Leave to issue execution to enforce the judgment, such leave to be suspended so long as the defendant pays £3 per week, such payment to be treated, as to £2 17*s.* 8*d.*, as the paying of accruing mesne profits, and, as to 2*s.* 4*d.*, as payment off of the amount due hereunder.

CLAUSON, L.J.: I agree.

FARWELL, J.: I agree.

Appeal allowed.

Solicitors: *H. W. Henniker Rance & Co.* (for the appellant); *Crane & Hawkins* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re GRIFFITHS. *Re* DAVIES' CONTRACT.

[COURT OF APPEAL (MacKinnon and Clauson, L.JJ.), **February 19, 1940.**]

Emergency Legislation—Contract for sale of land—Failure to complete—Application for leave to forfeit deposit and to re-enter—Onus of proof—Courts (Emergency Powers) Act, 1939 (c. 67), *s.* 1.

Under a contract, dated Dec. 16, 1937, the appellant agreed to purchase from the respondent certain land for £8,500, the contract to be completed on Oct. 25, 1939. The appellant paid a deposit of £500, and was let into possession, but was unable to complete the contract as agreed. The respondent commenced proceedings to obtain leave to forfeit the deposit and to re-enter into possession of the land. The effect of the evidence was that the appellant would not have been able to complete the contract even if hostilities had not broken out :—

HELD : the appellant had not discharged the onus which rested upon her of satisfying the court that her inability to complete the contract was due to circumstances arising out of the war.

A **[EDITORIAL NOTE.** In an application under the Courts (Emergency Powers) Act, 1939, it is fundamental that the party alleging inability to pay money or perform an obligation must show that that inability is due to circumstances arising out of the war. If it appears that there would have been the inability even if the war had not supervened, there is no case for relief.

AS TO EMERGENCY POWERS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, B para. 13 ; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Cases referred to :

(1) *A.* v. *B.*, [1940] 1 K.B. 217 ; [1939] 4 All E.R. 169 ; Digest Supp.

(2) *Tomley* v. *Gower and McAdam*, [1939] 4 All E.R. 460 ; Digest Supp.

INTERLOCUTORY APPEAL by the respondent from an order of C MORTON, J., dated Jan. 23, 1940. The application was for leave under the Courts (Emergency Powers) Act, 1939, to forfeit a deposit and to allow the applicant, the vendor, to enter into possession. The defendant, the appellant in this appeal, was the purchaser, and the respondent in this appeal was the vendor, of certain land at Cheston. D The contract was dated Dec. 16, 1937, and the date fixed for completion was Oct. 25, 1939. The purchase price of the land was £8,500, and £500 had been paid as the deposit. This was one of many transactions into which the parties had entered with each other. By the system of dealing formerly adopted, the respondent received 50 per cent. of E the profits made on the development of the land, while the responsibility for making the profit fell upon the appellant. The respondent changed his mind with regard to this transaction, and he entered into the contract with the original vendor and a contract of sub-sale with the appellant. All the costs were to be paid by the appellant. The trans- F action here in question was commenced in Dec., 1937, and the appellant had experienced considerable difficulty in developing the property before the outbreak of war.

A. Grant, K.C., and *F. E. Skone James* for the appellant.

G. H. B. Streatfeild, K.C., and *R. Cozens Hardy Horne* for the G respondent.

Grant, K.C. : This is not an ordinary transaction in which A sells to B, and later A seeks leave to forfeit the deposit by reason of B's failure to complete. The effect of granting the respondent the remedies he seeks would be to deprive the appellant of over £2,000, as she has spent H sums upon the property. Further time should be given to the appellant to enable her to sell part of the property. Time is not of the essence of a contract of this kind.

Skone James followed on the same side.

Streatfeild, K.C. : In *A.* v. *B.* (1), it was held that the Courts (Emergency Powers) Act, 1939, existed for the benefit of debtors who were unable to complete contracts owing to circumstances which were connected with the war. The Act, however, cannot be treated by debtors as a kind of windfall to enable them to escape from the consequences of failure to complete contracts which they would not have been able to complete in any event. The difficulties of the appellant are not due to the war. There is no evidence which tends to show that her position A would have been different from what it is if the war had not broken out. *Tomley* v. *Gower* and *McAdam* (2) is in many respects similar to the present case.

Grant, K.C., in reply.

B

MACKINNON, L.J.: The plaintiff and the defendant in this case entered into a contract, dated Dec. 16, 1937, whereby the defendant agreed to purchase from the plaintiff a building estate at Cheston. She paid £500 deposit, and agreed to complete the purchase by a payment of £8,000 on Oct. 25, 1939. She agreed also to pay interest on the C purchase price at the rate of 7 per cent. until that completion. A certain amount of interest was paid by the defendant to the plaintiff, and then she defaulted. When Oct. 25, 1939, arrived, the defendant then was not in a position to complete and pay the agreed price. In accordance with the original contract, she had been given immediate possession D of the property.

In those circumstances, the plaintiff issued an originating summons, dated Oct. 26, 1939, asking for an order from the court that he might be at liberty to exercise the remedy now available to him by way of (*a*) forfeiture of the deposit of £500, and (*b*) the re-taking of possession E of the property comprised in the contract, which, as I say, had been given to the defendant. That summons was served upon the defendant, and with it, as part of the form, a notice informing her that those remedies might not be exercised without the leave of the court, and calling attention to the provisions of the Courts (Emergency Powers) F Act, 1939. The defendant sought to take advantage of the provisions of that Act, and, therefore, it was necessary for her to satisfy the court, under sect. 1 (4) of the Act, that she, being a person liable to satisfy the judgment or order, or pay or perform the obligation in question, was unable to do so immediately: G

> . . . by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged . . .

That was the issue which came before the judge. The defendant in evidence put forward certain facts as to her financial position, and as to what she had been doing with this land, but the judge came to H the conclusion that all that she had said only went to show that she had entered into a highly speculative undertaking, that, owing to circumstances totally unconnected with the war, it was extremely unlikely that she would ever have been able to bring it to a successful conclusion and pay the purchase price in Oct., 1939, and that her inability to do that had not been shown by her to be in any way caused by circumstances "directly or indirectly attributable" to the war. In those circumstances, the judge was of opinion that she had not satisfied the requirement of the statute, and thereby established a reason why the plaintiff should be prevented by the court from exercising his ordinary legal rights.

We have now heard the matter, and counsel for the appellant has called our attention to the evidence. I agree with the judge. I do not think that the defendant even began to establish that her difficulty in this matter, and her inability to perform her obligation under this contract, were caused directly or indirectly by the existence of the war. That being so, no reason has been adduced, as it seems to me, why the plaintiff should not be entitled to exercise his ordinary rights according to the contract which he entered into with the defendant. That being so, I think that the appeal from the judge's decision fails.

Clauson, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Gustavus Thompson & Sons*, agents for *R. G. B. Regge*, Walton-on-Naze (for the appellant); *Wrentmore & Son* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

HOLLIS *v.* WINGFIELD AND OTHERS.

[Court of Appeal (MacKinnon and Clauson, L.JJ.), **February 19, 1940.**]

Mortgage—Accounts—Mortgagee in possession—Sum received for principal and interest—Whether mortgagee entitled to deduct amount of tax on interest.

A mortgagor mortgaged certain shares in a company to a first mortgagee for £7,000 and interest, which was later reduced to approximately £5,000. The company went into liquidation, and the liquidator paid to the first mortgagee from the proceeds of sale of the company's property an amount of some £9,000, and the first mortgagee became to that extent a mortgagee in possession. The mortgagor had also created a second mortgage. In a redemption action brought by the mortgagor, an account was ordered of the dividends and sums received by the first mortgagee in respect of the mortgaged shares. The first mortgagee filed an account showing certain sums which she had deducted from interest received and paid to the revenue as income tax in respect of this interest. The mortgagor contended that the first mortgagee was not entitled to deduct the sums so paid as income tax:—

Held: the first mortgagee was entitled to discharge the amount of the tax for which she was liable out of the moneys which she had received as interest on the mortgage.

Decision of Farwell, J. ([1940] 1 All E.R. 442) *affirmed.*

[EDITORIAL NOTE. The point here decided is purely on the question of accounting by a mortgagee in possession. The matter is of great importance to mortgagees in possession now that the rate of income tax has increased so greatly, but few mortgagees take possession of the mortgaged property.

AS TO ACCOUNTING BY MORTGAGEE IN POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 396-404, paras. 591-605; and FOR CASES, see DIGEST, Vol. 35, pp. 647-651, Nos. 3775-3839.]

Case referred to:

(1) *Union Bank of London* v. *Ingram* (1880), 16 Ch.D. 53; 35 Digest 661, *3952*; 50 L.J.Ch. 74; 43 L.T. 659.

INTERLOCUTORY APPEAL by the plaintiff from an order of FARWELL, J., dated Jan. 31, 1940, and reported [1940] 1 All E.R. 442, where the facts are fully set out.

J. Norman Daynes, K.C., *C. A. J. Bonner* (for *J. A. Brightman*, on war service) and *Herbert Hart* for the appellants.

Cyril L. King, K.C., and *G. D. Johnston* for the respondent, the first mortgagee.

Daynes, K.C.: It is unfair to the puisne incumbrancer to say that the interest should be treated as gross and not as net interest. As regards the revenue authorities, there is no evidence as to how far the interest will be treated as being paid out of money which has already borne tax. The mortgagor is personally liable to the revenue because he had had the benefit of the deduction of the tax. It was quite unnecessary for the first mortgagee to have paid for her protection, and the money so paid can be recovered. There is no reason why, in this case, the ordinary procedure should be departed from. [Counsel referred to *Union Bank of London* v. *Ingram* (1).]

Counsel for the respondent were not called upon.

MACKINNON, L.J.: This problem—to me, at any rate—is not at first sight at all an easy one, but I have reached a clear view about it, and I have no doubt that the judgment of FARWELL, J., is correct. Miss Finch was in possession of certain income which happened to be interest on a mortgage. It was interest payable to her as mortgagee. If she were paid that interest by the mortgagor, he would have been entitled to, and indeed did, deduct the tax when paid. Her liability for tax upon the interest she received would then be discharged, because she would have suffered deduction by the mortgagor when he paid the interest to her.

In this case, she gets her interest. She gets it, however, not because the mortgagor pays it to her, but because, as mortgagee in possession, she has realised the security and come into possession of a certain fund out of which she is entitled to recoup herself for her capital, and to satisfy any interest due to her. So far as, out of that fund, she satisfies her claim for interest, she receives a portion of her income in the matter of interest. In respect of that income, she is liable to pay income tax. The mortgagor has not paid it to her, and he has not deducted the tax. Therefore, she has no discharge of her liability for income tax by reason of its having been deducted on payment to her.

Having received a certain sum by way of interest, and being liable to pay tax upon that receipt, what answer would she have to a claim for the tax by the revenue, except to put the amount in her return for income tax, pay the tax, and get the receipt, as she has in fact done? In other words, Farwell, J., seems to me to have been perfectly correct when he said, at p. 445, that the mortgagor:

> . . . never has had the money, and never has become liable to pay tax. The person who is liable to bear the tax on the interest on the mortgage is the mortgagee, who has had the money, and is liable as the person who has received the money, and must account for the tax. In my judgment, the mortgagee, in taking the course which she took in this case of discharging her liability for the tax out of the moneys in her hands, was not doing anything which she was not entitled to do.

As it seems to me, one might go further, and say that she was not doing anything but that which she was bound to do. In other words, I think that, in the special circumstances of this case, Miss Finch was in error in the original account which she put in when she credited her items of interest in that account less tax. If she had received those sums paid to her by the mortgagor, that would have been correct. In fact, however, she received those items of interest as part of the proceeds of the security which she, as the first mortgagee, had realised. In realising those items of interest, she had not suffered any deduction of tax. She had got the whole amount, and she was liable to pay income tax on it. Those being the real facts in the case, the decision of the judge seems to me to be perfectly right, and this appeal fails.

Clauson, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Evill & Coleman* (for the appellants); *Fladgate & Co.* (for the respondent, the first mortgagee).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SHOP INVESTMENTS, LTD. *v.* SWEET.

[King's Bench Division (Wrottesley, J.), **January 23, 24, 29, 1940.**]

Income Tax—Lease of furnished cinema—Rent received by lessors in excess of Sched. A assessment—Apportionment of rent in respect of premises and furniture—Income Tax Act, 1918 (c. 40), *Scheds. A, D.*

The appellant company granted a lease of cinema premises for 42 years at a yearly rent of £2,285, which rent included payment for the use of a considerable amount of furniture in the cinema. The lease contained a covenant by the lessees to keep the furniture in repair, and, if necessary, to replace it, and to hand it back at the end of the term. The appellant company, however, did not carry on a business of letting furnished properties. The rent was in excess of the Sched. A assessment. The premises were assessed to income tax under Sched. A, and, in addition, the company was assessed under Sched. D in respect of the balance of rent received by them in excess of the amount of the assessment under Sched. A as representing a profit excluded from consideration in the assessment under Sched. A:—

Held: the composite rent must be disintegrated by a separation of the element in such rent which related to the hereditament from that which was due to the fact that the hereditament contained furniture; but the part assessable under Sched. D was not necessarily the balance after the deduction of the Sched. A assessment. The rent must be apportioned as in *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2).

[EDITORIAL NOTE. It is now treated as settled that the assessment to income tax in respect of the demised premises proper is wholly covered by the Schedule A A
assessment. It is also settled, however, that the inclusion of a payment for goodwill, fittings, or furniture in the sum called rent renders that payment liable to be also assessed under Schedule D. The real question here is as to the apportionment under the two schedules and it is held that the rent must be apportioned according to the respective values of the premises and the other property included in the total rent, and that it is not correct to deduct the Schedule A assessment from the total B
rent and to assess the remainder under Schedule D. The reason for this is that the assessment under Schedule A covers the whole liability to tax so far as the premises are concerned. The present decision treats the case of *Windsor Play-House, Ltd.* v. *Heyhoe* (3), where the facts were very similar to those in the present case, as overruled by the decision in *Whelan* v. *Alfred Leney & Co., Ltd.*, *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2). C

As to Assessment of a Composite Rent, see HALSBURY, Hailsham Edn., Vol. 17, pp. 34, 35, para. 62; and for Cases, see DIGEST, Supp., Income Tax, Nos. 116a-116g.]

Cases referred to:

(1) *Fry* v. *Salisbury House Estate, Ltd.*, *Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.*, [1930] 1 K.B. 304. D

(2) *Whelan* v. *Alfred Leney & Co., Ltd.*, *Loughnan* v. *Marston's Dolphin Brewery, Ltd.*, [1936] A.C. 393; [1936] 1 All E.R. 468; Digest Supp.; 105 L.J.K.B. 197; 154 L.T. 537; 20 Tax Cas. 321.

(3) *Windsor Play-House, Ltd.* v. *Heyhoe* (1933), 17 Tax Cas. 481; Digest Supp. E

(4) *Campbell* v. *Inland Revenue* (1879), 1 Tax Cas. 234; 28 Digest 7, case *l.*

(5) *Vaudeville Electric Cinema, Ltd.* v. *Muriset*, [1923] 2 Ch. 74; 35 Digest 307, *550*; 92 L.J.Ch. 558; 129 L.T. 466.

Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, for the F
opinion of the King's Bench Division of the High Court of Justice. The business of the appellant company consisted of the buying of properties, the acceptance of surrender of existing leases with a view to modernising the premises, and letting or selling the property so modernised. At no time had the company equipped buildings in any G
way for the purpose of letting premises furnished. The facts relevant to the assessment here reviewed are fully set out in the judgment. The question was whether the difference between the amount of certain rents received by the company as lessor of certain premises and the amount of the Sched. A assessment was chargeable to tax under the H
Income Tax Act, 1918, Sched. D. It was contended on behalf of the company:

(i) That the company did not at any relevant time carry on a business of letting furnished premises.

(ii) That the company did not seek to make, and had not in fact made, any profit from letting the fittings and fixtures.

(iii) That the whole profit arising to the company in respect of the Hounslow Empire was chargeable under the Income Tax Act, 1918, Sched. A, and had been so charged, and that the company could not be assessed under Sched. D for any amount by which the assessments under Sched. A might be insufficient to cover the profit.

(iv) Alternatively, that, if the company had in this case made a profit from letting fittings and fixtures, such profit must, for purposes of assessment under Sched. D, be separated from the profit made by letting the hereditament demised A therewith, and that this could only properly be done by estimating the part of the total rent of £2,285 which was attributed by the parties to the use of the fittings and fixtures.

(v) That the assessments should be discharged. *Campbell* v. *Inland Revenue* (4), *Whelan* v. *Alfred Leney & Co., Ltd., Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2), *Vaudeville Electric Cinema, Ltd.* v. *Muriset* (5) and *Fry* v. *Salisbury House Estate, Ltd.* (1) were referred to and relied on, and *Windsor Play-House, Ltd.* v. B *Heyhoe* (3) was distinguished.

It was contended on behalf of the Crown:

(i) That the decision in *Fry* v. *Salisbury House Estate, Ltd.* (1) related only to profits arising from the letting of unfurnished premises.

(ii) That the profits arising from the letting of the cinema fully equipped and furnished were distinct from the profits which the company as landlord derived from C its property in the premises.

(iii) That the profits arising from this letting of the cinema so equipped and furnished were outside the scope of Sched. A, and were assessable under Sched. D.

(iv) That the assessments were correct in law and in amount, and should be confirmed. *Windsor Play-House, Ltd.* v. *Heyhoe* (3) was referred to and relied upon.

D The finding of the special commissioners was as follows:

On the evidence adduced before us, we were of opinion that the contentions of the Crown were correct, and that, on the authority of *Windsor Play-House, Ltd.* v. *Heyhoe* (3), the assessments under Sched. D were rightly made to include the rent received under the lease, and we accordingly confirmed the assessments appealed against.

E *Cyril L. King, K.C.*, and *F. N. Bucher* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), *Reginald P. Hills* and *P. H. Thorold Rogers* for the respondent.

WROTTESLEY, J.: In this case, the relevant facts are few and F simple. The appellant company tried to buy a cinema or hall, called the Hounslow Empire, in order to pull it down and build shops on the site. Negotiations disclosed, however, that the owners had given their lessees, who already had a lease for 35 years, an option to purchase the reversion, so that this scheme had to be abandoned. The lessees G were, however, prepared to purchase the hall from the owners for £25,500 and pass it on to the appellants for £29,500, provided that the appellants let it back to them for 42 years, as against the remaining 33 years of the term which they already enjoyed, at a yearly rent of £2,500. These terms, embodied in a letter of Nov. 9, 1938, were later H reduced into two agreements—(i) an agreement of purchase by the appellants from the lessees, and (ii) an agreement of lease by the appellants to the lessees. The agreement for sale provided that a considerable amount of furniture in the cinema should pass with the cinema to the appellant company, though this had not been referred to in the letter of Nov. 9, and the lease must be taken to include this furniture. Moreover, the lease contained various covenants obliging the lessees to carry on their entertainment business and to keep in repair and, if necessary, replace the furniture, and, finally, to hand it back at the end of the term. The lessee company continued to carry on their entertainment business and pay the agreed rent, which was modified in view of certain payments which the lessees undertook to make, and became £2,285.

The Crown claims that this rent ought to be taxed under Sched. D, on the ground that it is profits under either Case I or Case VI—that is to say, profits of a trade, or at least a profit not taxed or taxable in any other way. They are willing to deduct from the sum, and so to give credit for, the amount at which the premises have already been taxed under Sched. A. The appellants say that the whole rent they receive is nothing but rent, and is, therefore, already taxed under Sched. A. The fact is that the hereditament is in fact already taxed under Sched. A, but at some figure substantially less than £2,285.

The first question which arises is whether the rent of £2,285 is partly in consideration of the furniture and fixtures other than those adhering to the hereditament and which the appellants purchased and subsequently let to their tenants. Although the amount of the rent was apparently fixed and agreed without reference to these chattels, I cannot say that there was no evidence on which the commissioners could find that the rent was partly in consideration of this furniture and fittings, and it is implied in the case that the commissioners so found. The appellants have, therefore, let something more than that which was assessed and taxed under Sched. A—namely, a furnished cinema—and the question is whether the Crown are right in claiming to tax the resulting "furnished rent," giving credit for, and so deducting from it, only the rental value under Sched. A, upon which tax has already been levied.

The appellants say that this is not the true method of assessment laid down in the Income Tax Acts, and rely on such cases as *Fry* v. *Salisbury House Estate, Ltd.* (1) and *Whelan* v. *Alfred Leney & Co., Ltd.* (2). The proper method, they say, is to analyse this rent, divide it up into its constituents, extract from it that part which is relative to the hereditament, and tax under Sched. D only that part, if any such be found, which is due to the furniture and movable fittings.

The Solicitor-General tells me that the method adopted in this case and approved by the commissioners is a long-standing practice, and any departure from it would result in a large amount of profit income going untaxed. Further, he relies, as did the commissioners, upon *Windsor Play-House, Ltd.* v. *Heyhoe* (3), which he says is rightly decided, and should govern my decision even though I may not agree with it. It will be seen that, by the method employed by the Crown, it is assumed that the whole of the additional rent paid in respect of any period over and above the rental value as assessed by Sched. A is profit due to the fact that the premises are furnished. In this connection, it has to be remembered that, if an unfurnished hereditament is let in fact at a higher rent than the amount at which it is assessed under Sched. A, this is a profit upon which no tax can be levied. The liability of such a hereditament to be taxed is exhausted by the tax levied under Sched. A. A The resulting anomaly is that, if a person lets his house furnished, he is assessed on the increased income which he receives over and above his Sched. A assessment, whether that increased income is due to an increased rental value of the hereditament as such or to the fact that it is furnished. If this anomaly is something which is inherent in the B Income Tax Acts, there is no more to be said, and the commissioners in this case are right. To see whether that is so, it is necessary to consider the authorities.

The case which makes it quite clear that the tax collected under Sched. A exhausts the Crown's powers, in so far as rental value of C property is concerned, is *Fry* v. *Salisbury House Estate, Ltd.* (1). If the assessment under Sched. A falls short of, or lags behind, the rent actually received for a hereditament, that gap or lag is not to be made up by calling the letting a trade, or by taxing the increased rent or profit under Sched. D. Income tax is one, and the tax collected under D Sched. A is the tax, and all the tax, that may be collected in respect of the letting of a hereditament. Incidentally, I may say that I see no ground in the facts of this case for saying that the appellants carry on the business of letting furnished cinemas. To some extent by accident, they in fact let one furnished cinema.

E What, then, is proper to be done if, together with a taxed hereditament, something else is included in the demise? The answer to this question is to be found in *Whelan* v. *Alfred Leney & Co., Ltd.* (2), in which the House of Lords appear to have applied the law as they had laid it down in *Fry* v. *Salisbury House Estate, Ltd.* (1). The composite F rent must be disintegrated, for only so can one be sure that one does not do what *Fry* v. *Salisbury House Estate, Ltd.* (1) has forbidden one to do—namely, fill in the gap between the Sched. A rent and the rent actually received in the year of assessment. By separating the element in the composite rent which relates to the hereditament from that part G which is due to the fact that the hereditament contains furniture, one treats all taxpayers alike. Similarly, if the demise includes goodwill, or rights, or entitles the tenant to services, there again is a subject for apportionment.

This, as I understand it, is the result of the principles laid down in H the cases to which I have referred. It is said, however, that *Windsor Play-House, Ltd.* v. *Heyhoe* (3) has concluded the matter, so far as this case is concerned. I should certainly not give judgment in a contrary sense to that given by FINLAY, J., in that case if he had had at that time the guidance which I now have in *Whelan* v. *Alfred Leney & Co., Ltd.* (2). I cannot, however, shut my eyes to the fact that *Windsor*

Play-House, Ltd. v. *Heyhoe* (3), whilst it came after the *Salisbury House* case (1), was some years before *Whelan* v. *Alfred Leney & Co., Ltd.* (2). It was relied upon in *Whelan* v. *Alfred Leney & Co., Ltd.* (2), and was reconsidered and approved then by FINLAY, J., in his judgment in *Whelan* v. *Alfred Leney & Co., Ltd.* (2). In all three cases, he was, I think, influenced by the fact that, unless he decided as he did, a large amount of income might, anyhow for a time, go untaxed. Moreover, he was not prepared to extend to cases like *Whelan* v. *Alfred Leney & Co., Ltd.* (2) the principle laid down in *Fry* v. *Salisbury House Estate, Ltd.* (1). There was a difference. In the latter case, the battle raged round the increased rent which the company obtained for letting in parts a hereditament assessed and taxed as a whole under Sched. A, for the company assented to being taxed under Sched. D in respect of profits made by housekeeping and other such services to their tenants. In *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2), on the other hand, there was included in the letting the goodwill which a brewer has through selling his own beer in his own tied houses. In the House of Lords, the principle laid down in *Fry* v. *Salisbury House Estate, Ltd.* (1) was applied to the two leases then under consideration, as it had been in the Court of Appeal. In *Whelan* v. *Alfred Leney & Co., Ltd.* (2), the Crown's method was found to be wrong, and the assessment was discharged. In *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2), an apportionment was directed to be made: see *per* LORD RUSSELL OF KILLOWEN, at p. 404.

I cannot, therefore, if I understand the decisions of the House of Lords rightly, take shelter behind *Windsor Play-House, Ltd.* v. *Heyhoe* (3), any more than FINLAY, J., himself would have done had he had before him in *Windsor Play-House, Ltd.* v. *Heyhoe* (3) the decision in *Whelan* v. *Alfred Leney & Co., Ltd.* (2).

Then it is said that, without appealing against it, the appellant cannot grumble if the rental value of the hereditament, as such, be taken at the valuation put upon it under Sched. A. Something akin to estoppel is suggested, the result of which is that the whole of the difference between the rent of £2,285 and the Sched. A assessment becomes of necessity the profit which the appellant derives from letting his furniture in the hereditament. To accept this argument would be to sidestep the decision of the House of Lords, not merely in *Fry* v. *Salisbury House Estate, Ltd.* (1), but also in *Whelan* v. *Alfred Leney & Co., Ltd.*, *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2), and to give the Crown, by a side wind, if a subject should let his house furnished, that which the Crown has been refused if the subject should let his house unfurnished. Moreover, it is an argument which, if sound, would have defeated completely the taxpayer's claims in *Whelan* v. *Alfred Leney & Co., Ltd.*, *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2). Particularly in *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2), apportionment would have been unnecessary, since all that was necessary was to deduct from the total rent received the Sched. A assessment, and the result was *ex hypothesi* the value of the only other thing demised—namely, the goodwill. Yet in that case LORD RUSSELL OF KILLOWEN thought it right to approve the order of the Court of Appeal and to order an apportionment, following the principle laid down in *Campbell* v. *Inland Revenue* (4). The fact that the stables in the last case were physically in a different part of Oban from that where the hotel lay is again no answer, for the goodwill in the case of *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2), if it had any local habitation, resided, I suppose, mainly in the tied houses which were assessed under Sched. A. I think, therefore, that the assessment was wrongly made, and that the commissioners should enter upon an inquiry as in *Loughnan* v. *Marston's Dolphin Brewery, Ltd.* (2).

Solicitors: *Wigram & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BOARLAND *v.* PIRIE APPLETON & CO., LTD.
STEMCO, LTD. *v.* INLAND REVENUE COMMISSIONERS.
STEMCO, LTD. *v.* HYETT.

[KING'S BENCH DIVISION (Wrottesley, J.), **January 22, 23, 1940.**]

Income Tax—Deduction against profits—Repairs—Depreciation of buildings—Full repairing covenant by lessee—Whether "whole of the burden of any depreciation" falls on lessee—Finance Act, 1937 (*c.* 54), *s.* 15 (1), (5).

Two companies, S., Ltd., and P. A. & Co., Ltd., who were lessees of certain premises used by them as factories for the purposes of their respective businesses, had entered into strict covenants to repair and maintain the respective premises and to deliver them up in good condition on the determination of the leases. The lease to S., Ltd., provided that the lessor should keep the heating apparatus and boilers in good order and condition, while the lease to P. A. & Co., Ltd., provided that the company should not be liable for damage arising to the buildings through actual subsidence or general failure of structure. The companies contended that, by reason of their obligations under the covenants to repair, the whole of the burden of any depreciation fell upon them, and that they were, therefore, entitled to the allowance for depreciation granted by the Finance Act, 1937, s. 15:—

HELD: upon the wording of the covenants to repair, the whole of the burden of any depreciation did not fall upon the companies. However faithfully a lessee may comply with a strict repairing covenant, there is going on all the time a continuing wearing out of the fabric, for which he is not made liable during, or on the determination of, the lease.

[**EDITORIAL NOTE.** The Finance Act, 1937, s. 15 speaks of the whole burden of any depreciation falling on the tenant by reason of the covenants to repair contained in the lease. It is here held that under the usual strict covenant to repair the tenant does not undertake the whole burden of repair, since, however fully a tenant may repair, there is still a depreciation by reason of the age of the building and the change from time to time in the nature of the buildings required for any purpose. It may be arguable whether this construction of the section gives any effect to the distinction which has repeatedly been drawn between a covenant to repair and a covenant to rebuild or renew. It has been said that in no case can a covenant to repair import an entire reconstruction, and it would seem to follow that, the legislature having used the words "covenants to repair," those words could not be construed to mean "covenants to rebuild or renew." A covenant so drafted as to place the whole burden of depreciation on the tenant would, in strict language, not be a covenant to repair, but a covenant to rebuild or renew.

As to Depreciation, see HALSBURY, Hailsham Edn., Vol. 17, pp. 165-169, paras. 337-343; and for Cases, see DIGEST, Vol. 28, pp. 45, 46, Nos. 230-232.]

Cases referred to:

(1) *Napier* v. *Ferrier* (1847), 9 Dunl. (Ct. of Sess.) 1354; 31 Digest 330, case *p*.
(2) *Allan* v. *Robertson's Trustees* (1891), 18 R. (Ct. of Sess.) 932.
(3) *Lister* v. *Lane & Nesham*, [1893] 2 Q.B. 212; 31 Digest 328, *4700*; 62 L.J.Q.B. 583; 69 L.T. 176.
(4) *Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K.B. 716; 31 Digest 329, *4710*; 130 L.T. 691; *sub nom. Calthorpe* v. *McOscar*, 93 L.J.K.B. 273.
(5) *Turner's Trustees* v. *Steel* (1900), 2 F. (Ct. of Sess.) 363; 31 Digest 326, case *4678i*.

Case Stated under the Finance Act, 1937, Sched. V, Part II, r. 4, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

By a lease, dated Jan. 1, 1919, Pirie Appleton & Co., Ltd., leased for a term of 21 years certain premises known as the Union Works, situated in Aberdeen. These premises were used as a factory for the purposes of their business. The lease contained, *inter alia*, the following provisions:

> (1) The second parties [the lessees] shall further be bound and hereby bind themselves and their foresaids to maintain the whole subjects in good condition and repair during the period of this lease and for that purpose timeously execute and carry out all repairs of every kind required to keep the premises in such good condition and repair. They shall not be liable for damage arising to the buildings through actual subsidence or general failure of structure, but otherwise the whole responsibility for maintenance shall fall upon them, and they shall be bound to hand back the premises to the first parties [the lessors] at the termination of the lease in as good condition as they received them.
>
> (2) The second parties shall at the termination of the lease be entitled to remove the whole plant and machinery belonging to them whether of the nature of moveables or fixtures and they shall not be liable for any damage thereby necessarily caused to the building.

The Union Works were occupied and used by the company as a factory, and were about 40 years old. The whole of the plant and machinery belonged to the company. The company had from time to time effected repairs to the works and fixtures, and the cost of such repairs had been allowed as deductions in the computation of the company's liability to income tax under Sched. D, Case I.

By a lease, dated Sept. 12, 1932, Stemco, Ltd., a company carrying on the business of manufacturing chemists, leased for a term of 20 years certain premises known as the Albert Street Works, which they used as a factory for the purposes of their business. By cl. 2 (3) of the lease, the company covenanted at all times during the term to repair and maintain the demised premises and all additions and improvements. By cl. 2 (15) they further covenanted to yield up the premises at the determination of the tenancy in good and substantial repair and condition. By cl. 3 the lessors covenanted to keep the heating apparatus and boilers in good order and condition. The company had from time to time executed repairs to the works, and the cost of such repairs had been allowed as deductions in the computation of the company's liability to income tax under Sched. D, Case I. The company had in fact done any repairs necessary to the heating apparatus and radiators. No repairs to the boilers had been necessary. It was stated in evidence that the obligation of the lessors to keep the heating apparatus and boilers in good order and condition must have been overlooked. It was agreed that the Albert Street Works were mills, factories or other similar premises within the meaning of the Finance Act, 1937, s. 15 (1).

The question for determination, in the case of each company, was whether the company should be treated, for the purposes of the Finance Act, 1937, s. 15, as if it were the owner of the premises and allowed a deduction in respect of depreciation as such.

The Finance Act, 1937, s. 15 (1), provides as follows:

> In computing for any year of assessment the amount of profits or gains arising or accruing from any trade the profits of which are chargeable to tax under Sched. D, Case I, there shall be allowed a deduction of an amount hereafter provided in respect of the depreciation of any premises being mills, factories or other similar premises, wherever situate, which, during the period of computation, are owned by the person carrying on the trade and occupied by him for the purposes thereof.

Sect. 15 (5) provides as follows:

> A person occupying any premises as the tenant thereof shall be treated for the purposes of this section as if he were the owner thereof if, under the covenants to repair contained in the lease or agreement by virtue of which he occupies the premises, the whole of the burden of any depreciation of the premises falls upon him.

It was contended on behalf of the companies:

> (*a*) That under the covenants to repair contained in the respective leases the whole burden of any depreciation of the premises fell upon the companies. (*b*) That the companies should be treated for the purposes of the Finance Act, 1937, s. 15, as if they were the owners of the premises, and so entitled to the allowance under the section.

The following cases were referred to on behalf of Pirie Appleton & Co., Ltd.: *Napier* v. *Ferrier* (1) and *Allan* v. *Robertson's Trustees* (2).

It was contended on behalf of the inspectors of taxes:

> (*a*) That under the covenants to repair contained in the leases the whole burden of any depreciation of the premises did not fall upon the companies; (*b*) that the companies were not entitled to the allowance for depreciation granted by the Finance Act, 1937, s. 15.

The following cases were referred to on behalf of the inspector of taxes: *Lister* v. *Lane & Nesham* (3), *Anstruther-Gough-Calthorpe* v. *McOscar* (4) and *Turner's Trustees* v. *Steel* (5).

The decision of the special commissioners regarding Stemco, Ltd., was as follows:

> Having considered the evidence and arguments adduced before us, we held that, having regard to the covenant by the lessors, under cl. 3 of the lease, to keep the heating apparatus and boilers in good order and condition, the whole burden of any depreciation of the premises did not fall upon the company. We therefore held that the appeal failed, and we adjusted the assessment to figures which were agreed between the parties.

The decision of the special commissioners regarding Pirie Appleton & Co., Ltd., was as follows:

> We, the commissioners who heard the appeal, were of opinion that under the terms of the lease the whole burden of maintaining the premises fell upon the company, and that it was entitled to the deduction conferred by the Finance Act, 1937, s. 15. We accordingly discharged the assessment.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the Crown.

F. N. Bucher for the respondent company.

H. B. Vaisey, K.C., and *J. S. Scrimgeour* for the appellant company.

WROTTESLEY, J.: There is one question which is common to all these three appeals. It is one upon which I have come to a conclusion, and so I think that I will give my reasons now. The question is whether or not the tenant of a factory under a lease containing what I may call a strict covenant, or strict covenants, by the tenant to repair and maintain the demised premises is a person upon whom, under those covenants, the whole of the burden of any depreciation of that factory falls. If he is such a person, then, when one is computing the amount of his profits or gains from the trade or business which he carries on in the factory, he is to be treated as if he owned the factory, and accordingly a deduction will have to be made from his profits and his receipts in respect of this depreciation of his factory, and the way in which that is to be calculated is shown in the Finance Act, 1937, s. 15.

It is agreed that, if the phrase "the whole of the burden of any depreciation of the premises" is used in its ordinary literal and common-sense meaning, then a tenant, however wide or strict the covenants to repair in his lease may be, does not bear such a burden. Certainly he does not bear the whole of any such burden. However faithfully he may comply with his strict repairing covenants, there is going on all the time a continuing wearing out of the fabric, for which he is not made liable during, or on the determination of, the lease. This wearing out is effecting a fall in value, which is what is commonly meant by "depreciation."

By those whom I would describe as the taxpayers in these three cases, however, it is said: "There never was a lease and there never were covenants to repair which imposed on the tenant the whole burden of depreciation literally speaking. If, therefore, this subsection is to perform any useful function, the meaning of the phrase must be cut down from its ordinary plain and usual meaning. In the first place, it

is to be cut down to cases where this burden is cast upon a tenant by the covenants in the lease, for that is so said in the subsection itself." Here again the taxpayers say that, in the literal sense, there are no such cases. They say that there are no covenants to repair which do that. All that is meant, and all that can be meant, therefore, is such
A a burden as is cast on a tenant by strict repairing covenants such as are to be found in all these three cases under argument. I think that the answer to that part of the argument is two-fold. The answer to the argument advanced by counsel for the appellant company, as I see it, is that the limiting words "covenants to repair" are necessary
B because the depreciation to be dealt with is that due to wear and tear as contrasted, for instance, with that due to change of fashion and that due to obsolescence of design. Obsolescence of design is something which does apply to factories, as we all know. That is one reason for bringing in something more than "covenants," and for bringing in
C the words "covenants" and "covenants to repair."

The second reason why that phrase is used is, I think, that it is a legal condition precedent to earning the relief dealt with in this section that the burden should be cast on the person asking for the relief by a covenant, and that it should take the form of a legal liability to a
D third party. The language is not of the happiest, I agree, and that is where the difficulty in this case comes in, for I think that it is right to say that no covenant to repair, as lawyers in this country, and I think also in Scotland—perhaps more so in Scotland—understand the words "covenant to repair," ever can strictly put upon a tenant the whole
E burden of depreciation. Even if that be so, however, I do not see how I can interpret the phrase "the whole of the burden of any depreciation" as not carrying its ordinary meaning just because the usual form of lease does not entitle the lessee to-day to relief. In any event, by getting out of one alleged absurdity, I am afraid I should only get into
F another one, and, by deciding in favour of the taxpayer here, I should bring it about that a tenant, who, unlike an owner, does not himself ultimately bear the loss due to depreciation, should, nevertheless, be given a measure of relief as though he did bear that burden. Thus, as I say, I should merely be getting out of one difficulty and into another.

G In a skilful and ingenious argument, counsel for the respondent company suggested that that could be justified in two ways, and so he arrived at the second limitation upon the otherwise plain words of the phrase "the whole of the burden of any depreciation of the premises." If one looks at subsect. (2) and subsect. (3), and particularly the latter,
H of this section, containing as they do the prescription for measuring the relief, he says that it is clear that the Act is aiming at giving relief to those who occupy premises subject to excessive vibration, and so to excessive wear and tear. I think that those subsections do indicate that, but here again I fail to see why a tenant whose factory is more costly to maintain and repair because of an unusual degree of vibration

should be allowed to deduct from his profits, not merely those extra costs, but also the resulting fall in value of the factory.

It is common ground that the extra cost of maintenance and repair is a deduction he can make already, without recourse to this section. The resulting fall in the value of the factory is a loss which will fall, not upon the tenant, but upon the owner when the lease expires or is terminated. The only sense in which that loss can fall on the tenant is that he will be occupying premises which are perhaps becoming every year a little less suitable for the purpose for which he is using them. That appears to me to afford a good reason for his getting a reduction of rent, but I do not see that it is a good reason for his getting a reduction in the tax which he has to pay.

Then there is put forward the argument that, strictly construed, subsect. (5) is empty of content, because there is no case to which it applies to-day. I think that the answer is that those who want the benefit of that section must first of all accept the burden borne by the owner-occupier in the like case—namely, (i) the burden of maintaining and repairing from time to time, and (ii) over and beyond that, the burden of carrying the loss due to the ownership of what is a wasting asset. I do not commit myself to the Solicitor-General's formula, but I have no doubt that by appropriate words in a lease a tenant could shoulder this burden, either in the way suggested by the Solicitor-General or in some other way, and that that could be put in that part of the lease which is properly described as the covenants to repair.

Passing to the particular cases argued, I deal first with the Scottish case of Pirie Appleton & Co., Ltd. I think that, under Scots law, the exception with regard to subsidence is no more than automatic. I think that the exception of subsidence is one which is made automatically by the court in what we in England would call a strict covenant. That seems to be common ground. I am not sure, however, that the other case—namely, general failure of structure—is one which is automatically excepted by the courts from the strict covenant to repair. The phrase "general failure of structure," unless, of course, it is a term of art with a special meaning, seems to cover two quite different cases, one being a hidden defect and the other being precisely that decay which takes place in an old fabric. Therefore, if "general failure of structure" means hidden defect, and hidden defect only, then I should be inclined to agree with the submission of counsel for the respondent company that the statement of those exceptions in actual language adds nothing to the deed or lease, for it would be a case which would already be excluded by the courts from the liability imposed on a tenant by strict covenants to repair. I think, however, that it is language which is appropriate, as I say, to that which takes place by a process of age, and, therefore, I think that one has here language which is particularly appropriate to describe the effect of depreciation. Thus, I think that, even if I were wrong in principle here, that language, not placing upon the tenant, but excluding from the tenant, the burden which may be arising from general failure of the structure, makes it quite plain that the tenant here is not bearing the whole burden of any depreciation.

As regards the other cases, the two cases of Stemco, Ltd., I do not find any real difficulty in construing this lease. At any rate, I think that two ordinary plain persons without any legal training would find no difficulty in understanding this lease. The effect of it would be that, whereas the premises, generally speaking, were the subject of a strict repairing covenant, the heating apparatus and boilers were excluded from the strict repairing covenant, the burden of keeping those in good order and condition being cast upon the landlord. Small and insignificant though that is, in a sense it again affords an illustration of a case where the whole of the burden of depreciation of the premises does not fall upon the tenant. I do not think that it can be said, and I do not think that counsel for the appellant company would like me to hold, that the heating apparatus and boiler are not let. I think that it must be said that they are let, although they are let as an appurtenance. Therefore, though it does seem rather a trivial exception, it seems to me that here again, in the rather strong language of the section, " the whole of the burden of any depreciation " does not fall upon the lessees in this case any more than in the other case. Therefore, for that special reason, quite apart from the decision in principle, I think that the Inland Revenue Commissioners were right in their decision. Therefore, in the result, I find that the Crown succeeds in all these cases.

First appeal allowed with costs. Second and third appeals dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Richards, Butler & Co.* (for the respondent company); *Piesse & Sons* (for the appellant company).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re BIRCHALL, *Re* VALENTINE, KENNEDY *v.* BIRCHALL.

[Court of Appeal (MacKinnon and Clauson, L.JJ., and Farwell, J.), **February 14, 1940.**]

Wills—Construction—Words of futurity—Gift to children of child who shall die in lifetime of testatrix—Child already dead at date of will.

A testatrix left property on trust for her children living at her death, and, if any such child " shall die in my lifetime leaving a child or children living at my death who being male shall attain the age of 21 years or being female attain that age or marry," the parent's share was to be taken by the grandchildren as though such child had survived the testatrix :—

Held : the children of a child already dead at the date of the will who had attained the age of 21 and were living at the time of the death of the testatrix were entitled to share in the residuary estate.

Re Lambert, Corns v. *Harrison* (1) and *Loring* v. *Thomas* (2) *followed.*

[**EDITORIAL NOTE.** Where a testator uses words of futurity without clearly showing the time contemplated, the words of futurity must be taken as speaking from the date of his making the will. This is the *prima facie* rule, subject to the exception that it does not apply where it is a question of what property is comprised in the will. It may, however, be shown by the context that the testator contemplated that the words of futurity should have reference to the time of his death, but, in the matter of the description of donees, there is a strong presumption that the description is to be construed according to the circumstances existing at the date of the making of the will. This presumption, however, is less strong in the case of a gift to a class on a contingent event. In this case, the whole context of the will must always be considered.

AS TO WORDS OF FUTURITY IN DESCRIPTION OF DONEES, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 714, 715, paras. 1335-1338; and FOR CASES, see DIGEST, Vol. 44, pp. 792-799, Nos. 6497-6545.]

Cases referred to:

(1) *Re Lambert, Corns* v. *Harrison*, [1908] 2 Ch. 117; 44 Digest 798, *6537*; 77 L.J.Ch. 553; 98 L.T. 851.

(2) *Loring* v. *Thomas* (1861), 1 Drew. & Sm. 497; 44 Digest 796, *6528*; 30 L.J.Ch. 789; 5 L.T. 269.

(3) *Barraclough* v. *Cooper* (1905), [1908] 2 Ch. 121, n.; 44 Digest 532, *3483*; 77 L.J.Ch. 555, n.; 98 L.T. 852.

(4) *Re Walker, Walker* v. *Walker*, [1930] 1 Ch. 469; Digest Supp.; 99 L.J.Ch. 225; 142 L.T. 472.

(5) *Gorringe* v. *Mahlstedt*, [1907] A.C. 225; 44 Digest 796, *6525*; 76 L.J.Ch. 527; 97 L.T. 111; *revsg.* S.C. *sub nom. Re Gorringe, Gorringe* v. *Gorringe*, [1906] 2 Ch. 341.

(6) *Re Metcalfe, Metcalfe* v. *Earle*, [1909] 1 Ch. 424; 44 Digest 798, *6538*; 78 L.J.Ch. 303; 100 L.T. 222.

(7) *Re Williams, Metcalf* v. *Williams*, [1914] 2 Ch. 61; 44 Digest 798, *6540*; 83 L.J.Ch. 570; 110 L.T. 923.

(8) *Re Cope, Cross* v. *Cross*, [1908] 2 Ch. 1; 44 Digest 796, *6526*; 77 L.J.Ch. 558; 99 L.T. 374.

(9) *Re Brown, Leeds* v. *Spencer*, [1917] 2 Ch. 232; 44 Digest 796, *6527*; 86 L.J.Ch. 561; 117 L.T. 268.

APPEAL by the defendants, grandchildren of the testatrix, from a judgment of SIR JOHN BENNETT, Vice-Chancellor of the Palatine Court of the County of Lancaster, dated July 17, 1939. The appellants are children of a child of the testatrix, which child had died before the date of the will, the respondents, being other defendants, consisting of children and other grandchildren. SIR JOHN BENNETT held that the appellants were not entitled to participate in the division of the residuary estate of the testatrix.

In giving judgment, he said that the primary meaning of the words "shall die" in a will was "shall hereafter die." The commonest case in which a context had been found for construing the word "shall" in a conditional sense, and not in a future sense, was where the will went on to say "leaving children living at my death who shall attain 21 years." There was here no such context, and it was impossible to give the word "shall" any meaning other than one of futurity, and, therefore, the clause applied only to children who died after the date of the will. The relevant clause in the will was in the following words:

> . . . my trustees shall stand possessed of the residue of the trust moneys and the investments for the time being representing the same (hereinafter called my trust estate) in trust for all my children . . . living at my death in equal shares and if there shall be only one such child the whole to be in trust for that child provided A that if any child of mine . . . shall die in my lifetime leaving a child or children living at my death who being male attain the age of 21 years or being female attain that age or marry then and in every such case such last-mentioned child or children shall take . . . the share which his her or their parent would have taken in my trust estate if such parent had survived me.

G. Maddocks (for *P. Ingress Bell*, on war service) for the appellants.

B *E. Ackroyd* for the respondents.

Maddocks: The Vice-Chancellor did not correctly interpret the authorities in regard to the effect of a proviso containing an independent gift to a contingent class of grandchildren. He was also wrong in relying upon the absence of the word "shall," as he appears to have done, in C connection with the words "attain the age of 21 years." He was applying the wrong principle. He was seeking to find and apply a dictionary meaning, whereas the true principle is that, where there is a gift for children with a gift over of the shares of those who shall die in favour of their children who "attain"—not necessarily "shall attain"—the D age of 21, the very presence of that gift to their children indicates that the testator intended that the independent gift should operate in favour of all grandchildren who qualified by satisfying the contingency. The principle laid down in *Loring* v. *Thomas* (2) is dependent, not upon the word "shall," but upon the presence in the will of an independent gift E which the testator necessarily intended should operate in favour of any grandchildren who qualified within the terms of the gift—that is, in the present case, who attained the age of 21 years. *Re Lambert, Corns* v. *Harrison* (1), except for the presence in that case of the word "shall," is practically identical with the present case. The words of F the will in the present case must mean either "shall attain" or "should attain." The qualification of attaining the age of 21 can be satisfied at any time before the date of distribution. In *Re Walker, Walker* v. *Walker* (4), no condition, such as attaining the age of 21 years, was attached to the gift. That was the reason why the court was unable to G apply *Loring* v. *Thomas* (2). In *Gorringe* v. *Mahlstedt* (5), it was found that the testator specifically referred to a deceased child, and the court could find nothing in the will to enable it to assume that that child was included in a gift to children of those "who shall die." In the present case, there are all the essential provisions of *Loring* v. *Thomas* (2). H The appellants are entitled to participate as children of a child of the testator, by reason of their having qualified in that they have attained the age of 21 years. [Counsel referred to *Barraclough* v. *Cooper* (3), *Re Metcalfe, Metcalfe* v. *Earle* (6), *Re Williams, Metcalf* v. *Williams* (7), *Re Cope, Cross* v. *Cross* (8) and *Re Brown, Leeds* v. *Spencer* (9).]

Ackroyd: In the cases which have been cited, the word "shall" has appeared in the second part of the bequest. It is for that reason that one can consider the real meaning of "shall" in the earlier part of the bequest. If it is of the nature of a condition in the second part, there is nothing to throw any light upon the meaning of the words in the earlier part of the clause—namely, "shall die in my lifetime." In *Loring* v. *Thomas* (2), the word "shall" is found in the second part. This is also the case in *Barraclough* v. *Cooper* (3) and *Re Lambert, Corns* v. *Harrison* (1). In *Re Metcalfe, Metcalfe* v. *Earle* (6), the words are "shall survive and attain," and this means "shall survive and shall attain." In *Re Walker, Walker* v. *Walker* (4) and *Re Cope, Cross* v. *Cross* (8), the word "shall" is not used in the second part, and, therefore, in those cases it has no repercussion in the construction of the earlier part of the wills, where the words are "and shall die." In the present case, the testatrix must be taken to have known that one of the children had been dead many years. The word "shall" in the second part of the clause is in the important part.

MACKINNON, L.J.: I think that this appeal succeeds. For my part, I propose to deal with it very shortly. In *Re Lambert, Corns* v. *Harrison* (1), decided over 30 years ago, which followed upon *Loring* v. *Thomas* (2) and *Barraclough* v. *Cooper* (3), the words in question were these:

> . . . "Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry . . . then and in every such case the last mentioned child or children shall take . . . the share which his her or their parent would have taken of and in the residuary trust funds if such persons had survived me."

In the present case, substituting "any child of mine" for "nephew or niece of mine," the words are precisely and identically the same, with the one difference that in *Re Lambert, Corns* v. *Harrison* (1) the words were "who shall survive me and being a son or sons shall attain the age of 21 years," whereas in this case they are, "who being male attain the age of 21 years." The decision in *Re Lambert, Corns* v. *Harrison* (1) was as follows:

> . . . the child, who attained 21 and survived the testatrix, of a nephew already dead at the date of the will was entitled to share in the residue.

In the present case, the claim is made by the child of a child already dead at the date of the will. It is said that the decision in this case ought to be to the contrary of that in *Re Lambert, Corns* v. *Harrison* (1), because the word "shall" is omitted before the word "attain." That is a subtlety which I am quite unable to appreciate. If these cases were to be decided upon minute differences of that sort, I am bound to say that the art of the construction of wills would get into a highly discreditable condition. The truth is that the words "who being male attain the age of 21 years" are exactly equivalent to the words "who being a male shall attain the age of 21 years." As I suggested during the argument, if one attempted to translate one or other of those two passages into Latin, I believe that one would have to express it in Latin by exactly the same verb. In those circumstances, this case appears to me completely indistinguishable from the decision in *Re Lambert, Corns* v. *Harrison* (1), which only followed from the decision in *Loring* v. *Thomas* (2) and *Barraclough* v. *Cooper* (3), and various other cases. Therefore, the same result ought to follow in this case as in those cases. For these reasons, I think that this appeal succeeds.

Clauson, L.J.: I agree, for the reasons which have been expressed by **MacKinnon, L.J.**

Farwell, J.: I also agree.

Appeal allowed.

Solicitors: *Percy Haseldine & Co.*, agents for *Wilfrid Taylor & Hindle*, Manchester (for the appellants); *Alfred McMaster*, Liverpool, agent for *Leo Kennedy & Glover*, Ormskirk (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MENZIES *v.* UNITED MOTOR FINANCE CORPORATION, LTD.

[Court of Appeal (Slesser, Luxmoore and Goddard, L.JJ.), **February 7, 1940.**]

Hire Purchase—Hire-purchase price—Less than £50—*Agreement providing for instalments of* £37 *and notional first payment of* £25—*Hire-Purchase Act,* 1938 (*c.* 53), *ss.* 1, 11 (1), (2), 20, 21.

The appellant entered into a hire-purchase agreement, dated Oct. 18, 1938, with the respondents, a finance corporation, in respect of a motor car. The appellant was the actual owner of the car, but in the agreement the respondents were described as owners, the object of the transaction being the making of an advance to the appellant on the security of her car. The agreement provided: "The total hire rent payable by 12 monthly rentals of £3 1*s.* 8*d.* each on the seventeenth day of each month commencing in Oct., 1938, £37." The appellant also agreed on the signing of the agreement to pay £25, the amount of a first payment set out in the schedule thereto, as consideration for an option to purchase. In fact, this payment was never made to the respondents, being only notionally paid to a third party. The appellant fell into arrears with her payments after more than one-third of the hire-purchase price had been paid, and the respondents thereupon took possession of the motor car. The appellant then sued them, alleging a breach of the Hire-Purchase Act, 1938, s. 11, and claiming the relief given by that section. The respondents contended that by reason of the payment of £25 contracted to be made, the hire-purchase price was £62, and that consequently the Act did not apply to this agreement:—

Held: as the payment of £25 had not been made to the respondents, it did not form part of the hire-purchase price payable by the hirer under the hire-purchase agreement. The Act, therefore, applied to the agreement, and the appellant was entitled to the relief claimed.

[**EDITORIAL NOTE.** The Hire-Purchase Act, 1938, only applies to motor cars where the hire-purchase price does not exceed £50. In considering what is the hire-purchase price, it is possible to ignore a payment which is purely notional, and only mentioned in the agreement to give it the appearance of a genuine transaction.

As to the Hire-Purchase Act, 1938, see HALSBURY, Hailsham Edn., Supp. Hire Purchase, para. 812a; and for Cases, see DIGEST, Vol. 3, pp. 92-98, Nos. 241-268.]

Case referred to:

(1) *Helby* v. *Matthews*, [1895] A.C. 471; 3 Digest 93, *245*; 64 L.J.Q.B. 465; 72 L.T. 841.

Appeal by the plaintiff from a judgment delivered by His Honour Judge Woodcock at Marylebone County Court on Dec. 13, 1939. The action was for the recovery of certain payments made in the course of a hire-purchase transaction in relation to a motor car. The hire-purchase price as stated in the agreement was £37, to be paid by 12 monthly instalments of £3 1*s.* 8*d.* The appellant paid 7 instalments, amounting to £21 11*s.* 8*d.*, and then fell into arrears, whereupon the respondents seized the motor car in accordance with the terms of the agreement. The appellant alleged a breach of the provisions of the Hire Purchase Act, 1938, s. 11, entitling her to a cancellation of the agreement, and a return of the instalments paid. There was also a provision for a first payment of £25, and the position with regard to this is fully dealt with in the judgment of Luxmoore, L.J.

Helenus P. J. Milmo for the appellant.

H. V. Lloyd-Jones for the respondents.

Milmo: In the circumstances, the hire-purchase price within the meaning of the Act was £37 10*s.*, and no more. The amount of the interest of the hire-purchase company—that is, the amount with which they part, and which they expect to be repaid to them under the agreement—is the hire-purchase price within the meaning of the Act.

Lloyd-Jones: The hire-purchase price is as stated in the documents—namely, the amount of the instalments due plus the deposit which the schedule to the agreement shows as a first payment. Only when the various instalments stated in the agreement to be due to be paid have been paid can credit be given to the hirer for payment of the initial deposit. This is then credited to her for the purpose of completing the transaction. Because, in the proposal form signed by her, she stated that she had already deposited the sum of £25 in cash, or its equivalent, with the owner of the car, she is estopped from denying that she has done so. The company, in paying the dealer £32 10*s.*, are entitled to treat the £25 as having already been paid to him. He is already holding part of the purchase price which is owed to him, and they are entitled to deduct this sum from their payments to him.

Slesser, L.J.: In this case, Amelia Menzies sought to recover certain payments which she had made in connection with a very curious and complicated transaction, which will be explained by LUXMOORE, L.J., in relation to a motor car which was originally hers. For the purpose of this case, however, I will assume, as the county court judge appears to have assumed, that the defendants, as owners, in reality hired the motor car from the plaintiff. On that assumption, the claim which she now makes is that she should recover the sums which she has paid as instalments under a hire-purchase agreement dated Oct. 18, 1938.

The question to be determined in this case is whether or not, in the circumstances, she is protected from what happened, in the events which I shall detail, by the Hire-Purchase Act, 1938. This lady, having agreed to pay a sum of £37 to be repaid by 12 monthly rentals of £3 1*s.* 8*d.* each on the seventeenth day of each month beginning in Oct., 1938, fell into arrears with her instalments. Relying upon their powers, if they be applicable under the memorandum of agreement, the persons described in that memorandum of agreement as owners of the motor car, the United Motor Finance Corporation, Ltd., on July 8, 1939, retook possession of—or, as they say, collected—the motor car.

The Hire-Purchase Act, 1938, s. 20 (1), provides that certain sections of that Act shall apply:

> . . . in relation to all hire-purchase agreements whether made before or after the commencement of this Act . . .

The Hire-Purchase Act, 1938, was passed on July 29, 1938, and it was provided by sect. 22 (2) that the Act should come into force on Jan. 1, 1939. Therefore, the Act as a whole was not in force at the time of the making of this agreement, but, by virtue of sect. 20, the relevant sections which we have to consider here were made operative retrospectively, and affect this agreement. That being so, the particular section we have to consider here, which is sect. 11, provides as follows:

> (1) Where goods have been let under a hire-purchase agreement, and one-third of the hire-purchase price has been paid . . . the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action.

In such a case, sect. 11 (2) provides as follows:

> If an owner recovers possession of goods in contravention of the foregoing subsection, the hire-purchase agreement, if not previously determined, shall determine, and (*a*) the hirer shall be released from all liability under the agreement.

Then follow these words, on which the appellant here relies:

> and shall be entitled to recover from the owner in an action for money had and received all sums paid by the hirer under the agreement . . . in respect thereof . . .

The only answer which can be made to the claim of the appellant here to recover the sums paid by the hirer, the instalments, is to be found in the argument that the relevant sections do not apply to this case by reason of the provisions of sect. 1 of the Act, which provides as follows:

> This Act shall apply in relation to all hire-purchase agreements, and credit-sale agreements under which the hire-purchase price or total purchase price, as the case may be, does not exceed (*a*) where the agreement relates to a motor vehicle . . . the sum of £50 . . .

It is contended here by the respondents, and was contended in the court below, that this agreement did relate to a hire-purchase transaction in which the price was more than £50. The hire-purchase price is defined in sect. 21 as follows:

> "Hire-purchase price" means the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates . . . A

I therefore look to the memorandum of agreement in this case to see what was the total sum payable by the hirer under the hire-purchase agreement. To my mind, that appears quite clearly in the agreement thus:

> The total hire rent payable by 12 monthly rentals of £3 1*s.* 8*d.* each on the B
> seventeenth day of each month commencing in Oct., 1938, £37.

The total liability payable under this hire-purchase agreement was £37, and, therefore, the agreement came within the ambit of the Hire-Purchase Act, 1938, s. 1 (*a*).

It is said that the total sum was not £37, but £62, and the reason for C
that contention is this. In the agreement, sect. 2 provides as follows:

> On the signing hereof the hirer agrees to pay to the owners the amount of the first payment set out in the schedule hereto as consideration for the option to purchase hereinafter given.

In reality, no such payment was made by the appellant to the United D
Motor Finance Corporation, Ltd., at any time. In the schedule attached
to the document to which I have just referred, there is the figure of £25
under the description "first payment." In truth and in fact, however,
this first payment was never made to the United Motor Finance
Corporation, Ltd., and formed no part of the hire-purchase price. E

It may well be that, where persons are hiring with an option of purchase
from somebody else for a first payment down and subsequent payments
by instalments, the first sum paid down may be, and very likely would
be, a part of the total sum payable under the hire-purchase agreement.
The sum is not limited, and there is no reason why it should be limited, F
to the instalments. It may include some initial sum paid down. On
the facts of this particular case, however, the United Motor Finance
Corporation, Ltd. (who describe themselves as, and I will assume for this
purpose that they are, the owners), never received this sum from the
hirer at all. The sum was notionally paid, if I may use that expression, G
to a third party, and, therefore, never was at any time a part of the
hire-purchase price.

The county court judge, as I understand his judgment, has been
influenced by a consideration of the value of this car, but that is a matter
which is entirely irrelevant to anything to be considered here. The only H
question to be considered here is what the hire-purchase price was. It
is clear beyond question that the hire-purchase price was £37, no more
and no less, and, consequently, the agreement being within the Act, this
company has unlawfully, contrary to sect. 11, attempted to enforce a
right to recover possession of the goods from the hirer otherwise than by

action. It follows that the hirer is now not only released from liability under the agreement but is also entitled to recover from the owner the money which has been paid under the agreement. As that is the claim which the hirer here makes, in my opinion, she brings herself directly within the rights conferred on her by sect. 11 of the Act. Therefore, this appeal succeeds, and the hirer should have judgment for the amount claimed.

LUXMOORE, L.J. : There is only one matter to which I should like to refer, because I think that there has been some insufficient statement of facts with regard to what is called the first payment—namely, the payment of £25. As I understand the facts, the plaintiff in the action was the owner of the car, and she wanted to borrow a sum of £30 or thereabouts on the security of the car. In order to enable her to do so, it was represented that she was buying the car for a sum of money from a motor dealer, that she had paid the motor dealer £25, and that she owed him on the car the sum of £32 10*s*. No such transaction had in fact ever taken place. She did not owe the motor dealer anything. The motor dealer represented to the United Motor Finance Corporation, Ltd., that he had received £25, and that the balance of £32 10*s*. was due, and he offered to sell the car to the United Motor Finance Corporation, Ltd., for £32 10*s*., and the finance corporation agreed to buy it at that price. It was in respect of that purchase price that the United Motor Finance Corporation, Ltd., represented themselves to be the owners of the car, and, as such owners, they purported to sell the car to the plaintiff for a sum which was to be paid by instalments representing a total of £37. There was in fact no first payment of £25 to the finance corporation, nor is the statement in the hire-purchase agreement that " on the signing hereof " the hirer was to pay to them £25, or any other sum, as a first payment in any way a correct representation of the facts. The finance corporation knew quite well that they were not to receive £25, and that the hirer was not going to pay it. All they were going to get under the hire-purchase agreement was £37 by twelve monthly instalments.

In those circumstances, I agree that it is quite impossible to say that the £25 is any part of the hire-purchase price, having regard to the definition of that phrase which is contained in the Hire-Purchase Act, 1938, s. 21. That being so, the hire-purchase agreement is a hire-purchase agreement for a sum under £50, and the Act applies to it. I agree entirely with what SLESSER, L.J., has said with regard to the application of this section to this particular case, and I am satisfied that the county court judge was in error in dismissing the plaintiff's claim. The plaintiff is entitled on this appeal to judgment for £21 11*s*. 8*d*.

GODDARD, L.J. : I propose to add a few words of my own, because the case seems to me to be one of some importance. I think that this is the first time the Hire-Purchase Act, 1938, has been considered in this court. At any rate, it is, as far as I know, the first time that it has been considered in relation to what is generally called nowadays hire-purchase finance.

It has fallen to my lot, when sitting in the King's Bench Division, to have had to try many cases arising out of hire-purchase finance, and I have always found that many of the difficulties which occur in those cases become clear when the true nature of the transaction is thoroughly understood. It is a comparatively recent development in commercial transactions, and has been imported, I think, from America. It is only in recent years that extensive use has been made of it. It is important to understand the distinction which exists in fact between those hire-purchase cases where "the owner of the goods," to use the expression of the Act, is a hire-purchase company and the ordinary transactions of hire purchase which take place where the owner of the goods is a shop-keeper who is selling the goods on hire purchase. In that case, as in *Helby* v. *Matthews* (1) and that class of case, the shopkeeper or dealer in the goods himself enters into a contract of hire purchase with the would-be purchaser. If he is selling £100 worth of furniture, it is a common thing to find that he stipulates for a first payment of, say, £20, and for so many monthly instalments of stated sums. The hire-purchase price, in those circumstances, of course, is £100. The buyer pays down £20, and has to pay so many monthly instalments.

Nowadays, largely due to the desire of people who cannot pay for them in a lump sum to buy motor cars, refrigerators, vacuum cleaners, or other household equipment, there has been evolved a system by which they are enabled to buy these things, which they could not afford to pay for at once, from dealers who, however, also cannot afford to wait for their money. When one is considering this hire-purchase finance, one has to remember that the whole object of the business is to finance the dealer. It is not the case of a dealer in the goods entering into a hire-purchase agreement with a would-be buyer of the goods.

I am going to deal with this case, for the purposes of my judgment, exactly as though this were a genuine hire-purchase agreement by this hirer, and as though there had not been all this misrepresentation as to the real nature of the transaction. I am going to deal with it as though it were an ordinary transaction entered into by a woman who wanted to buy a car from the dealer. What happens then? The car dealer cannot afford to wait for his money when the car is sold on the instalment system, and so he goes to one of these corporations who are prepared to finance the transaction. In essence, the transaction is a loan of money by the finance corporation to the dealer. The question of how much the dealer wants is entirely a matter for the dealer. If the dealer is selling a car for, say, £200, it may be that he will take as a payment down, and the customer can afford to pay, £50. Thus, the dealer then wants to be financed to the extent of £150. The way the transaction is worked is this. The dealer purports to sell the car to the finance company, and the finance company then purport to let the car on hire purchase to the would-be customer. The hire-purchase company acquire the property in the car which they have to let, not for £200, but for £150. That is what they pay to the dealer. They are interested in the total price to be paid for the car, because it is to their interest to know that there is what I may call a good and valuable car. Their security for getting their money back is then all the greater. It may be that, if they found that the dealer was selling the car for £150, and wanted £150, they would not lend the money, any more than an intending mortgagee would lend up to the full amount of the mortgage property. However, the first payment which is made, in those circumstances, is made to the dealer. He retains that money. It is his money, and he keeps it for himself. The finance company have not any right to recover that money from the dealer. They cannot bring any action against him. He has not received it for their use. He has received it for his own use. In truth, what he has done is this. He has borrowed the balance from the hire-purchase company, and their true interest in the transaction is the loan which they have advanced to the dealer. So here, when one is considering what, for the purposes of this Act, is the hire-purchase price, and one finds that the Act says, "'Hire-purchase price' means the total sum payable by the hirer under the hire-purchase agreement," that must mean the total which he pays to the person with whom he is entering into the agreement.

The total price which he is paying here is the price which the hire-purchase company have advanced, plus charges and plus interest—namely, £37. In fact, it is not arguable that the sum payable here was any sum other than £37. The fact that they chose to put into their agreement that a first payment had been made is neither here nor there. If they say that it has been made to them, they are saying something which is not true. The first sum was paid to the dealer. It remains the dealer's property, and nobody but the dealer is interested in the money. In my opinion, it is perfectly clear that the hire-purchase price which was paid in this case was not £62, but £37. The Act, therefore, applies, and I agree with SLESSER, L.J., that the plaintiff is entitled to the relief she seeks.

Appeal allowed with costs.

Solicitors: *Lewis & Raynes* (for the appellant); *Kinch & Richardson*, agents for *Barrett & Thomson*, Slough (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES *v.* REPRESENTATIVE BODY OF THE CHURCH IN WALES AND TITHE REDEMPTION COMMISSION.

[CHANCERY DIVISION (Morton, J.), **January 31, February 1, 6, 7, 1940.**]

Ecclesiastical Law—Church in Wales—Lay corporation—Duty to repair chancel of parish church—Right of Representative Body to part of redemption stock—Welsh Church Act, 1914 (*c.* 91), *ss.* 1, 3, 4, 8, 10, 13, 19, 28—*Welsh Church* (*Temporalities*) *Act,* 1919 (*c.* 65), *ss,* 1, 2, 4—*Tithe Act,* 1936 (*c.* 43), *ss.* 1, 2, 4, 31.

The plaintiffs were the Commissioners of Church Temporalities in Wales as constituted by the Welsh Church Act, 1914, s. 10, and, as such, were a lay corporation. The first defendants, the Representative Body of the Church in Wales, were a body incorporated by Royal Charter, pursuant to the Welsh Church Act, 1914, s. 13. The second defendants the Tithe Redemption Commission, were created by the Tithe Act, 1936, s. 4. The plaintiffs asked for the determination of two questions—namely, (i) whether the liability for the repair of the chancel of a certain parish church in the county of Carmarthen formerly attaching to the ownership of a tithe rentcharge which, by virtue of the Welsh Church Act, 1914, s. 4, vested in the plaintiffs, and which, by virtue of sect. 8 of that Act, became transferable, but was not actually transferred, to the Carmarthen County Council, had ceased to attach to the ownership of the rentcharge, and whether the latter had ceased to be subject to the liability for the repair of the chancel, and (ii) whether the first defendants were precluded, by reason of the Welsh Church Acts, 1914, and 1919, from receiving a part of the redemption stock to be issued by the second defendants in respect of the extinguishment of the rentcharge on Oct. 2, 1936, as provided by the Tithe Act, 1936 :—

HELD : (i) as, on the facts, the plaintiffs were the legal owners of the tithe rentcharge, they were, on the proper construction of the relevant sections of the Welsh Church Act, 1914, and the Tithe Act, 1936, liable to repair the chancel.

(ii) as the plaintiffs had not ceased to be liable to repair the chancel before Oct. 2, 1936, and as they had not transferred the tithe rentcharge to the county council before that date, the first defendants were not precluded from receiving a part of the redemption stock payable in respect of the extinguishment of the tithe rentcharge.

[**EDITORIAL NOTE.** The liability to repair the chancel was before 1936 placed on the owners of the tithe rentcharge. By the Act of 1914, the tithe rentcharge was transferred to the plaintiffs herein, but such transfer was not to be permanent, but merely while certain transitional provisions relating to the disestablishment of the Welsh Church were given effect to. Ultimately, the tithe rentcharge was to be transferred to the county council, but this is held not to prevent a proportionate part of the redemption stock from being payable to the Representative Body of the Church in Wales. This result may appear inconsistent, and is probably due to an oversight on the part of those who drafted the Act of 1914.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 581, 582, para. 1026 ; and FOR CASES, see DIGEST, Vol. 19, p. 307, Nos. 1062-1065.]

Cases referred to :

(1) *Wickhambrook Parochial Church Council* v. *Croxford,* [1935] 2 K.B. 417 ; Digest Supp. ; 104 L.J.K.B. 635 ; 153 L.T. 187.

(2) *Church Temporalities in Wales Comrs.* v. *Gustard,* [1923] 1 K.B. 640 ; 38 Digest 503, *583* ; 92 L.J.K.B. 349.

(3) *Hough* v. *Windus* (1884), 12 Q.B.D. 224 ; 42 Digest 702, *1188* ; 53 L.J.Q.B 165 ; 50 L.T. 312.

ORIGINATING SUMMONS under R.S.C., Ord. 54A, r. 1A, for the determination of the following questions—namely, (i) whether or not the liability for the repair of the chancel of a certain parish church in Wales attached to the ownership of certain tithe rentcharges, and whether or not the latter had ceased to be subject to liability to repair, and (ii) whether or not the Representative Body of the Church in Wales were precluded from receiving a part of the redemption stock to be issued by the Tithe Redemption Commission in respect of the extinguishment of those rentcharges. The facts and arguments are fully set out in the judgment.

C. S. Rewcastle, K.C., *J. V. Nesbitt* (*M. J. L. Beebee* with him) and *R. T. E. Latham* for the plaintiffs.

R. F. Roxburgh, K.C., and *W. S. Wigglesworth* for the first defendants.

H. O. Danckwerts for the second defendants.

MORTON, J.: The plaintiffs on this originating summons, the Church Temporalities in Wales Commissioners, are a statutory corporation created by the Welsh Church Act, 1914, s. 10, which Act brought about the disestablishment of the Church of England so far as it existed in Wales and Monmouthshire. Sect. 10 (1) provides as follows:

> Such persons, not exceeding three in number, as His Majesty may by warrant under his sign manual appoint, of whom one at least shall be a member of the Church of England, shall be commissioners under this Act. If any vacancy among them occurs by death, resignation, incapacity, or otherwise, His Majesty may, by warrant under his sign manual, appoint some fit person to fill the vacancy.

Then subsect. (2) provides as follows:

> The said commissioners (in this Act referred to as the Welsh Commissioners) shall be a body corporate, styled, "The Commissioners of Church Temporalities in Wales" with a common seal, and power to hold land for the purposes of this Act without licence in mortmain.

I will pause there to say that there is no dispute that the plaintiffs are a lay corporation. The first defendants, the Representative Body of the Church in Wales, are a body incorporated pursuant to the Welsh Church Act, 1914, s. 13, which provides as follows:

> (1) Nothing in any Act, law, or custom shall prevent the bishops, clergy, and laity of the Church in Wales from holding synods or electing representatives thereto, or from framing, either by themselves or by their representatives elected in such manner as they think fit, constitutions and regulations for the general management and good government of the Church in Wales and the property and affairs thereof, whether as a whole or according to dioceses, and the future representation of members thereof in a general synod or in diocesan synods, or otherwise. (2) If at any time it is shown to the satisfaction of His Majesty the King that the said bishops, clergy, and laity have appointed any persons to represent them, and hold property for any of their uses and purposes, His Majesty in Council may by charter incorporate such persons (in this Act referred to as the representative body), with power to hold land without licence in mortmain.

In fact, the representative body, as I shall call it for brevity, was incorporated subsequently by Royal charter. The second defendants, the Tithe Redemption Commission, are a statutory body created by the Tithe Act, 1936, s. 4. Sect. 4 (1) of that Act provides as follows:

> There shall be established for the purposes of this Act a commission to be called

> the "Tithe Redemption Commission" (in this Act referred to as "the commission"), consisting of a chairman and not more than four other commissioners appointed by the Treasury after consultation with the Minister of Agriculture and Fisheries (in this Act referred to as "the Minister").

Then the section goes on to mention the duties which are to be performed by the Tithe Redemption Commission.

The contest on this summons, which is no doubt a friendly contest between two representative bodies, arises between the plaintiffs and the first defendants. The Tithe Redemption Commission do not take sides in the matter, and their counsel addressed no argument to me on their behalf. The two questions which are raised by the summons are closely linked together:

> (1) Whether or not the liability for the repair of the chancel of the parish church of Llanglydwen in the county of Carmarthen formerly attaching to the ownership of the tithe rentcharges of £100 per annum which before Mar. 31, 1920, belonged to the rectory of the said parish but which on that date by virtue of the Welsh Church Act, 1914, s. 4, vested in the plaintiffs and by virtue of sect. 8 (1) (*c*) of that Act became transferable by them to the council of the said county of Carmarthen had before Oct. 2, 1936, by virtue of sect. 28 of that Act or otherwise by virtue of the Welsh Church Acts, 1914 and 1919, ceased to attach to the ownership of the said rentcharges and whether or not the said rentcharges had before Oct. 2, 1936, so ceased to be subject to such liability within the meaning of the Tithe Act, 1936, Sched. VII, Part I, para. (1) (*b*) . . . (2) Whether or not the defendants the Representative Body of the Church in Wales are by reason of the provisions of the Welsh Church Acts, 1914 and 1919, precluded from receiving pursuant to the Tithe Act, 1936, a part of the redemption stock to be issued by the defendants the Tithe Redemption Commission for compensation in respect of the extinguishment on Oct. 2, 1936, of the said rentcharges by the said Act.

To state the matter more shortly, as I am able to do, having read those questions, I have to decide whether or not, immediately before Oct. 2, 1936, the plaintiffs were liable to repair the chancel of the parish church of Llanglydwen. Of course, if they never became so liable, they could not have ceased to be liable. If, on the other hand, they were at any time made liable, and were not liable immediately before Oct. 2, 1936, I think it follows that they ceased to be liable within the meaning of the Act. I think the question, therefore, can be put in this simple form. Were the plaintiffs, immediately before Oct. 2, 1936, liable to repair the chancel of this parish church? If, as they say, they were not so liable, they are entitled to receive the whole of the redemption stock mentioned in the second question of the summons. If the plaintiffs were so liable, then I think it must follow, on the Tithe Act, 1936, that the representative body is entitled to receive a part of that stock.

I am told that this is a test case and that the decision of this case will govern, or may govern, many other cases, and determine the ownership of very large sums of stock. I have felt considerable doubt, in the course of the argument of counsel for the plaintiffs and of counsel for the first defendants, about the matter, but, as I have arrived at a definite conclusion, based on the reasons which I think can be stated quite simply, I think it unnecessary for me to reserve my judgment.

The facts in the case are not in dispute, and they are as follow. The ecclesiastical parish of Llanglydwen, which I shall hereafter call the parish, is situate in the county of Carmarthen and in the diocese of St. David's. It is coterminous with the tithe district of Llanglydwen. At all material times, the sole benefice in the parish was a rectory with cure of souls, which I shall hereafter call the rectory, and the holder of which at any material time I shall hereafter call the rector. Immediately before Oct. 1, 1845, that being the date upon which tithe was commuted into tithe rentcharge, all tithes and payments in lieu of tithes issuing out of lands in the parish belonged to the rector as such. As from Oct. 1, 1845, all tithes and payments in lieu of tithes issuing out of lands in the parish, including tithes of glebe, became commuted for annual tithe rentcharges of £100 in the aggregate, apportioned to issue out of lands in the parish, including glebe lands. This commutation took place by virtue of an award duly made pursuant to the Acts for the commutation of tithes on Apr. 20, 1844, and by virtue of an apportionment annexed thereto, which award was duly confirmed by the Tithe Commissioners for England and Wales on Apr. 27, 1844, and which apportionment was so confirmed on Feb. 18, 1846. From a Parliamentary Return, dated May 4, 1848, it appears that on Dec. 31, 1847, the whole of the tithe issuing out of lands in the parish commuted and apportioned under the Acts for the commutation of tithes consisted of tithe rentcharges of an aggregate annual amount of £100 belonging and payable to the rector as parochial incumbent. These tithe rentcharges of the aggregate annual amount of £100 at all times since the commutation and prior to Mar. 31, 1920, belonged, and were payable, to the rector as parochial incumbent. These tithe rentcharges of the aggregate annual amount of £100 I shall hereafter call the tithe rentcharges, referring to them collectively. There was not at any time prior to Mar. 31, 1920, belonging to or appropriated to the use of the rectory or to the rector as such any fund or endowment specially allocated to the repair, restoration, or improvement of the fabric of any church or other ecclesiastical building in the parish. The Welsh Church Act, 1914, s. 1, as amended by the Statute Law Revision Act, 1927, provides as follows:

> On the day (in this Act referred to as the date of disestablishment), the Church of England, so far as it extends to and exists in Wales and Monmouthshire (in this Act referred to as the Church in Wales), shall cease to be established by law, and, save as by this Act provided, no person shall, after the passing of this Act, be appointed or nominated by His Majesty or any person, by virtue of any existing right of patronage, to any ecclesiastical office in the Church in Wales.

The date of disestablishment was subsequently, by the Welsh Church (Temporalities) Act, 1919, s. 2, fixed as Mar. 31, 1920, and that is the reason why I have specified that date in my statement of the facts. The Welsh Church Act, 1914, s. 4 (1), provides as follows:

> As from the date of disestablishment there shall, save as by this section provided, vest in the Welsh Commissioners herein-after mentioned [the plaintiffs on this summons] (*a*) all property vested in the Ecclesiastical Commissioners or Queen Anne's Bounty, which is ascertained as herein-after mentioned to be Welsh ecclesiastical property; and (*b*) all property not so vested, and not consisting of charges on the common fund of the Ecclesiastical Commissioners, which, at the passing of this Act, belongs to or is appropriated to the use of any ecclesiastical office or

> cathedral corporation in the Church in Wales, or the holder of any such office as such; subject, in the case of all such property, to all tenancies, charges, and incumbrances, and to all rights and interests saved by this Act, affecting the property.

It is not in dispute that the tithe rentcharge, as I have called it, came within sect. 4 (1) (*b*), and vested in the plaintiffs as from Mar. 31, 1920, the date of disestablishment. The Welsh Church Act, 1914, s. 8 (1), provides as follows:

> Subject to the provisions of this Act, the Welsh Commissioners shall by order transfer the property vested in them by this Act, as follows: (*a*) they shall transfer to the representative body (i) all churches . . . (iii) all funds or endowments specially allocated to the repair, restoration, or improvement of the fabric of any such church or ecclesiastical residence. . . . (*c*) of the property not so transferred to the representative body they shall transfer any tithe rentcharge which was formerly appropriated to the use of any parochial benefice to the council of the county in which the land out of which the tithe rentcharge issues is situate. . . .

I do not think I need read for the moment the rest of that section, but, if we turn to the part which I have read, it provides that the plaintiffs shall transfer—it is imperative—the tithe rentcharge to the Carmarthen County Council, but no date is stated for such transfer. Sect. 10 (7), however, provides as follows:

> The powers of the commissioners shall continue until the end of the year in which this Act is passed and for 3 years thereafter, and no longer, and the commissioners shall then be dissolved; but it shall be lawful for His Majesty from time to time with the advice of his Privy Council, on the application of the commissioners, to suspend the dissolution of the commissioners and, subject to revision by the Treasury of the salaries of the commissioners and the remuneration and number of their officers, to continue their powers for such time, not exceeding in the aggregate 2 years, as His Majesty thinks fit.

From that subsection it appears that, at the time when the Act was passed, it was not thought likely that the discharge of their duties by the commissioners, including the transfer of the various properties to the parties who were ultimately to receive them, would take a very long period, but I must now explain why the plaintiffs have not yet been dissolved, and why, as is the fact, the tithe rentcharge has not yet been transferred to the Carmarthen County Council. The Welsh Church (Temporalities) Act, 1919, s. 1 (1), provides as follows:

> His Majesty in Council may, from time to time, on the application of the Welsh Commissioners appointed under the Welsh Church Act, 1914, suspend the dissolution of the said commissioners, and, subject to revision by the Treasury of the salaries of the said commissioners and the remuneration and number of their officers, continue their powers for such time as His Majesty thinks fit. . . .

By sect. 4 (1) of the same Act, it is enacted as follows:

> The Welsh Commissioners may postpone the transfer under the Welsh Church Act, 1914, of any property vested in them to any person or body of persons, whether corporate or unincorporate, other than the representative body, and such person or body of persons shall not be bound to accept the transfer of any such property until the Secretary of State so directs; and so long as any tithe rentcharge which was previously attached to a benefice remains vested in the Welsh Commissioners, the Welsh Commissioners shall be deemed to be the owners of a tithe rentcharge attached to a benefice for the purposes of the Tithe Rentcharge (Rates) Act, 1899.

The plaintiffs were duly appointed pursuant to the Welsh Church Act, 1914, s. 10 (1). Their dissolution has been duly suspended, and is now suspended, and their powers have been duly continued, and do now continue, by virtue of an order in council under sect. 1 (1) of the Act of 1919. Thus, the tithe rentcharge vested in the plaintiffs on Mar. 31, 1920, by virtue of sect. 8 (1) (*c*) of the Act of 1914. The plaintiffs postponed the transfer of the tithe rentcharge to the county council under the powers conferred on them by sect. 4 (1) of the Act of 1919, and the tithe rentcharge was vested in the plaintiffs until Oct. 2, 1936. Of that there is no doubt. At the date of the passing of the Welsh Church Act, 1914, the rector was the Rev. Samuel Davies, and he continued to be rector until his death, which occurred on Nov. 20, 1922.

I must now turn to certain portions of the Tithe Act, 1936. By sect. 1, it is enacted as follows:

> Subject to the provisions of this Act, all tithe rentcharge shall be extinguished on Oct. 2, 1936 (in this Act referred to as "the appointed day"), and accordingly as from that day the land out of which any tithe rentcharge issued immediately before that day shall be absolutely discharged and freed therefrom.

The Tithe Act, 1936, s. 2 (1), provides for the issue of stock, to be called "redemption stock," to be

> . . . charged by way of guarantee on the Consolidated Fund and the growing produce thereof . . . for the compensation of the persons interested in a tithe rentcharge in respect of the extinguishment thereof by this Act.

I have already read the Tithe Act, 1936, s. 4 (1), which established the second defendants. I must now read sect. 4 (2), which provides as follows:

> It shall be the duty of the commission, subject to and in accordance with the provisions of this Act, (*a*) to determine what tithe rentcharges have been extinguished by this Act, the amount of stock to be issued for compensation in respect of the extinguishment thereof, and the persons entitled to receive the stock to be so issued. . . . and to perform such other functions for the purposes of this Act as are hereafter in this Act mentioned.

The Tithe Act, 1936, s. 31 (1), provides as follows:

> The provisions of this section shall have effect with respect to liabilities to repair chancels of churches or other ecclesiastical buildings arising from the ownership of (*a*) tithe rentcharge extinguished by this Act in respect of which stock is to be issued under this Act. . . .

Sect. 31 (2) provides as follows:

> In respect of liability to repair arising from the ownership of a tithe rentcharge extinguished by this Act in respect of which stock is to be issued under this Act, the diocesan authority shall be entitled to receive a part of the stock to be issued in respect of the rentcharge equal in amount to such a sum (in this section and in Sched. VII to this Act referred to as "the sum required for repairs") as may be reasonably sufficient, having regard to the condition of the chancel or building at the appointed day, to provide for the cost of future repairs thereof and to provide a capital sum the income of which will be sufficient to insure it for a sum adequate to reinstate it in the event of its being destroyed by fire.

The body referred to in this subsection as the diocesan authority is, in the case of the tithe rentcharge which I am considering, the first defendants, the Representative Body of the Church in Wales. That is so by reason of the Tithe Act, 1936, Sched. VII, Part III, which provides as follows:

> Modifications as to Wales and Monmouthshire. (1) For references to the diocesan

authority or to Queen Anne's Bounty there shall be substituted references to the Representative Body incorporated under the Welsh Church Act, 1914, s. 13.

The result is that, if the plaintiffs were liable to repair the chancel immediately prior to Oct. 2, 1936, it would appear that a substantial portion of the redemption stock which is to be issued under the Act would pass to the representative body, and the Carmarthen County A Council would be deprived of that stock. It is noteworthy, moreover, that the sum referred to as "the sum required for repairs" includes the cost of future repairs of the chancel, I suppose in perpetuity, and is to provide a capital sum which would be sufficient by the income thereof to insure the chancel "for a sum adequate to reinstate it in the event of B its being destroyed by fire." Thus, it is plain that the decision of this question is one of considerable importance to the parties. The extent to which provision has to be made in respect of the sum required for repairs may have some bearing upon the point which I have to decide. The Tithe Act, 1936, s. 31 (5), provides as follows: C

> The foregoing provisions of this section shall have effect subject to the provisions of Sched. VII, Part I, to this Act, which relate to the apportionment of liability to repair in certain cases.

Sect. 31 (8) provides as follows:

> This section and Sched. VII to this Act shall have effect in relation to a chancel D or building in Wales or Monmouthshire subject to the modifications specified in Sched. VII, Part III.

To these modifications I have already referred, the modification which is material for the purpose of this case being that for the words "references to the diocesan authority" I must substitute the words "references E to the representative body."

I must now turn to Sched. VII, Part I, to which I am referred by sect. 31 (5), which I have already read. Para. 1 provides as follows:

> The commission [the second defendants] shall ascertain in relation to every chancel or other ecclesiastical building for the repair of which liability attached to the F ownership of tithe rentcharge agreed or awarded on the original commutation of tithes under the Tithe Acts (*a*) the rentcharges in respect of which such liability attached and the aggregate amount of those rentcharges; (*b*) which, if any, of those rentcharges was or were redeemed under the Tithe Acts or ceased before the appointed day to be subject to such liability, and the amount, or the aggregate amount, as the case may be, of any such rentcharges; and (*c*) the identity and the aggregate amount (in this part referred to as "the apportionable amount of G rentcharge liability") of the residue of those rentcharges.

The language of this part of the schedule does not appear to be altogether consistent, because in the earlier portion of it reference is made to the "liability attached to the ownership of tithe rentcharge," which is, I think, on the authority of *Wickhambrook Parochial Church Council* v. H *Croxford* (1), an accurate description of the liability, whereas in para. 1 (*b*) reference is made to rentcharges being "subject to such liability." However, I do not think any real importance, for the purpose of this case, can be attached to that variation of language. I think that para. 1 (*b*) is merely referring to rentcharges which render their owners liable, by reason of the ownership thereof, to carry out the repairs. The Tithe Act, 1936, Sched. III, Part I, provides as follows:

> Persons to whom stock is to be issued. Stock to be issued for compensation in respect of the extinguishment of a tithe rentcharge shall be issued . . . (1) In the case of a rentcharge which immediately before its extinguishment was vested [in the commissioners, to the commissioners].

I think that it is clear that, if, immediately before Oct. 2, 1936, the plaintiffs were liable, as legal owners of the tithe rentcharge, to repair the chancel, part of the stock to be issued in respect of the extinguishment of the tithe rentcharge must be issued to the representative body, and I have now to consider whether or not the plaintiffs, immediately before Oct. 2, 1936, were liable to repair the chancel.

There are three points which seem to me to be quite clear in this difficult case. First of all, as I have said, immediately before Oct. 2, 1936, the plaintiffs were the legal owners of the tithe rentcharge. This plainly appears from the facts as I have stated them. Secondly, apart from any statutory provision to the contrary, they would, as such legal owners, immediately before Oct. 2, 1936, be liable to repair the chancel. If authority is needed for this proposition, it will be found in *Wickhambrook Parochial Church Council* v. *Croxford* (1). Thirdly, if there is any statutory provision which relieves the plaintiffs from the liability to repair the chancel, it must, I think, be found in the Welsh Church Act, 1914. It is not suggested by counsel that it can be found in any other Act. I now turn back to the Act of 1914 to see if I can find any such provision. Counsel for the plaintiffs says that it is to be found in sect. 3, which I must now read. Sect. 3 (1) provides as follows:

> As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law.

Sect. 3 (2) provides as follows:

> As from the same date the then existing ecclesiastical law and the then existing articles, doctrines, rites, rules, discipline, and ordinances of the Church of England shall, with and subject to such modification or alteration, if any, as after the passing of this Act may be duly made therein, according to the constitution and regulations for the time being of the Church in Wales, be binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound, and shall be capable of being enforced in the temporal courts in relation to any property which by virtue of this Act is held on behalf of the said Church or any members thereof, in the same manner and to the same extent as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound.

Counsel for the plaintiffs says that this section destroyed the liability to repair the chancel as from the date of disestablishment. He relies upon the whole of subsect. 1, and says that these words extinguish any liability which would otherwise have rested on the plaintiffs by virtue of the ownership of the tithe rentcharge, an ownership which was, as appeared from the sections which I have read, vested in them by this same Act. The reply of counsel for the first defendants to this is threefold. First of all, he says that sect. 3, on its true construction, does not operate to extinguish the liability at all. It does not apply to this particular liability. Secondly, he says that, even if the liability would otherwise have been extinguished by sect. 3, it is expressly preserved by sect. 4, which vested the tithe rentcharge in the plaintiffs:

> . . . subject . . . to all tenancies, charges, and incumbrances, and to all rights and interests saved by this Act, affecting the property.

Thirdly, he says that there is a general provision in sect. 28 of the Act which makes it plain that nothing in the whole of this Act can affect the liability to repair the chancel, which, in the absence of any statutory provision, would rest upon the plaintiffs as owners of the tithe rentcharge. As regards the first contention, I cannot put upon sect. 3 (1) so limited a construction as that which counsel for the first defendants invites me to put upon it. Much of the argument has turned upon the question whether or not the liability to repair the chancel is part of the ecclesiastical law of the Church in Wales mentioned in sect. 3 (1). I have been referred to a long and very interesting series of authorities, ranging over some hundreds of years. I do not propose to deal with those authorities in detail, for reasons which will appear hereafter, nor do I propose to discuss, for the same reasons, the precise scope and effect of sect. 3 (2). Nevertheless, as the matter has been very fully argued, I think that I ought to express the view which I hold that the contention of counsel for the plaintiffs on this part of the case is correct. The authorities which have been cited to me satisfy me that the liability to repair the chancel is properly described as part of the ecclesiastical law of the Church in Wales within the meaning of sect. 3 (1), and, apart from any other provisions which may appear in the Act, it would seem that the liability to repair the chancel would be destroyed by sect. 3 (1). As regards the second point of counsel for the first defendants, he did not contend before me that the liability to repair the chancel could be a tenancy, charge or incumbrance within the meaning of sect. 4 (1). He stated—and I think rightly—that he was precluded from putting forward that argument in this court by reason of the *Wickhambrook* case (1), but he desired to keep the point open if, as I gather is likely, this case should go to the House of Lords. He contended, however, that the liability to repair the chancel was covered by the words, "all rights and interests saved by this Act, affecting the property." For reasons which again will appear hereafter, I do not think that it is necessary for me to discuss that argument in detail. All I shall say is that I think there would be certain difficulties in holding that the liability to repair the chancel is a right or interest affecting the property, in view of the decision in the *Wickhambrook* case (1).

It is to be observed that the liability was held in the *Wickhambrook* case (1) to be a personal one, and, prior to the passing of the Chancel Repairs Act, 1932, the appropriate procedure for compelling a person liable to repair the chancel to carry out his duty was to seek to have him admonished by the appropriate ecclesiastical court in a cause of office promoted against him in that court. That being the nature of the liability at the time of the passing of the Act of 1914, and at the date of disestablishment, if that be material, I think that there are certain difficulties in coming to the conclusion that this liability is a right or interest affecting the property, whether or not it is a right A or interest saved by the Act. On that part of the case, I have formed no concluded opinion, nor is it necessary for me to do so, having regard to the view which I take of sect. 28 of this Act.

I pass now to the third argument of counsel for the first defendants, which, if it is correct, is a very far-reaching one indeed. Counsel for the B first defendants contends, as I have said, that sect. 28 has the effect that nothing in the Act affects the liability which, in the absence of any statutory provision, attaches to the plaintiffs as owners of the tithe rentcharge. Sect. 28 provides as follows :

> (1) Nothing in this Act shall affect any liability to pay tithe rentcharge, or the C liability of any lay impropriator of any tithe rentcharge to repair any ecclesiastical building, but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under this Act, be liable for the repair of any ecclesiastical building. (2) Such liability as aforesaid of a lay impropriator may be enforced in the temporal courts at the instance of the representative body in like manner as if such liability arose under a covenant made with the representative body and running with the tithe rentcharge.

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Before I consider the effect of this section, I think that I ought to read sect. 8 (2), which I omitted to read when I read the provisions as to the transfer of the property in sect. 8. I read it for the purpose of seeing whether or not at this stage it throws any light on the problem which I have to determine. Sect. 8 (2) provides as follows :

E

> Save as otherwise provided by this Act, all property transferred under this section [the section provides for the transfer of the whole of the property vested in the plaintiffs by the Act] shall be held subject to all existing public and private rights with respect thereto

The word " existing " is defined as follows in sect. 38 of the same Act :

F

> The expression " existing " means existing at the passing of this Act.

Then subsect. (2) continues as follows :

> and all tenancies, charges, and incumbrances which may at the date of transfer be subsisting therein, and in the case of all such property, except tithe rentcharge transferred to a county council, to the existing interests of all persons who at the G passing of this Act hold ecclesiastical offices in the Church in Wales, and in the case of such tithe rentcharge to the obligation to make such provision as is hereinafter mentioned in lieu of such existing interests.

A good deal of argument has taken place as to this subsection, and I think that each side, to some extent, relies upon the subsection as H promoting its own cause. It is to be observed, however, that the subsection, whatever may be its true construction in other respects, refers to the position after the property has been transferred to those who are ultimately to take it, and, for my part, although I have considered the subsection with great care, and have read it many times, I do not find that it is of any real assistance in the problem which I have to determine, which deals with the period still subsisting on Oct. 2, 1936, when the tithe rentcharge remained vested in the plaintiffs and had not yet been transferred to the county council.

With regard to sect. 28, to which I must now return, counsel for the plaintiffs contends that the words "lay impropriator" in this section are words of art. Not every lay person who owns tithe rentcharge, he says, is a lay impropriator. The words refer only to the direct successors in title of persons who acquired the tithe, afterwards tithe rentcharge, by impropriation resulting from royal grants made by various statutes, from the dissolution of the monasteries by Henry VIII until the time of William III. He specifies more particularly the lay impropriators to whom these words refer by referring me to a list in Grove's Alienated Tithes, pp. 654 *et seq.*, and he says that, on the true construction of sect. 28 (1), the term "lay impropriator" has that very special meaning. Secondly, he says that, even if the term "lay impropriator" has a wider meaning than that, the scope of the section is limited to the state of affairs existing at the date of disestablishment, and refers only to lay impropriators who were properly described as such immediately prior to the date of disestablishment.

As regards the first contention of counsel for the plaintiffs, I am satisfied that, whatever may be the true significance of the words "lay impropriator" in certain contexts, or in a different context, they apply in this section to any lay person, or body of persons, owning a tithe rentcharge. Apart altogether from the wording of the remainder of the section, to which I shall shortly refer, it seems to me most unlikely that in this section the legislature intended to draw any distinction between the lay impropriators described by counsel for the plaintiffs and any other lay persons owning tithes. I think that the words "lay impropriator" are there used merely in contradistinction to the words "ecclesiastical appropriator," just as Romer, L.J., used those words in his judgment in the *Wickhambrook* case (1). I can see no reason for treating the class of lay persons owning tithe rentcharges referred to by counsel for the plaintiffs differently from any other lay persons owning tithe rentcharges. If, however, I had felt any doubt upon this point, it is removed, to my mind, by the words of sect. 28 (1):

> . . . but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under this Act, be liable for the repair of any ecclesiastical building.

This provision seems to me to be quite unnecessary unless a county council owning tithes is a lay impropriator within the meaning of the section. Surely the legislature is saying, in effect, by this section that the liability of a lay impropriator is preserved, but it is desired—the word "but," I think, is of vital importance—to make an exception in the case of a county council which is entitled to, or receives, any tithe rentcharge under this Act. If this is so, it seems to me plain that the legislature regards such a county council as being a lay impropriator within the meaning of the section, and, if such a county council is a lay impropriator within the meaning of the section, it seems to me that the plaintiffs must also be lay impropriators within the meaning of the section. It is not disputed that the plaintiffs are a lay body. In fact, there is a decision to that effect in *Church Temporalities in Wales Comrs.* v. *Gustard* (2), and, if it be said, "It is true that the plaintiffs are entitled to tithe rentcharge, and the county council will be entitled to tithe rentcharge, but that is only by virtue of this same Act, and it only takes effect, as regards the plaintiffs, at the date of disestablishment, and, as regards the county council, at a later date," then I reply: "I can see no distinction between the county council and the plaintiffs as regards this particular matter." If one of them is a lay impropriator —and I think it is reasonably clear from the section that the legislature regarded the county council as a lay impropriator—then I think that the plaintiffs must also be lay impropriators within the meaning of the section.

These words of sect. 28 (1) which I have read also seem fatal to the second contention of counsel for the plaintiffs. If the section had been dealing only with bodies or persons who were lay impropriators immediately before the date of disestablishment, these words would have been quite unnecessary. I think that it must follow from the provision introduced by the word "but" that the section is dealing with the liability of any lay impropriator at any time, and, if one asks, "Are the plaintiffs, by reason of being entitled to the tithe rentcharge immediately before Oct. 2, 1936, liable to repair the chancel?" I think that this section has the effect of saying: "You will find nothing in the Act of 1914 which affects their liability. If they are otherwise liable, there is nothing in this Act which frees them from the liability." I may observe finally, in regard to sect. 28, that the framers of the Act must, of course, have known, because the provisions are contained in the same Act, that the tithe rentcharge would successively vest in the plaintiffs and in the Carmarthen County Council. The legislature have thought fit to insert an express exemption of the county council in terms, and I think that that is a strong indication that the plaintiffs were not intended to be exempted. Counsel for the plaintiffs suggests that it is inconceivable that, as a county council is clearly ultimately exempted from this liability, the legislature should have intended the plaintiffs to be subject to it. He described the plaintiffs as being a mere conduit pipe, through which the tithe rentcharge was ultimately to pass to the county council. I do not think the words "conduit pipe" are altogether an apt description, nor did counsel for the plaintiffs suggest that they were an exact description. The plaintiffs are not merely bare trustees during the period in which the tithe rentcharge is vested in them. They have certain important powers and duties during that period. For instance, by sect. 9 they are directed to determine certain matters. By sect. 11 they are given wide powers to decide certain questions. By sect. 27

they are given certain powers of management and sale of the property vested in them, and by sect. 30 they are given powers to borrow. It does not seem to me inconceivable that the plaintiffs were intended to be liable for the repair of the chancel, notwithstanding that the county council is expressly exempted from that liability. The Act itself suggests certain reasons why this should be so, and in particular counsel for the first defendants referred me to sect. 19 of the Act of 1914. Subsect. 1 (*a*) of that section provides as follows :

> The property formerly appropriated to the use of parochial benefices and transferred to a county council shall be applied, in accordance with one or more schemes made by that council either alone or jointly with any other such council and approved by the Secretary of State, to any charitable or eleemosynary purpose of local or general utility, including the aiding of poor scholars . . .

Sect. 19 (2) provides as follows :

> In framing schemes under this section as to the application of property formerly appropriated to the use of parochial benefices, due regard shall be had to the wants and circumstances of the parish in which the property is situate or from which it is or has been derived, and of the parish comprising the ecclesiastical parish to which any such property was attached, and generally to the circumstances of each particular case.

These provisions seem to me to supply—and possibly there are other provisions to which reference can be made—a special reason why the county council was exempted by the legislature from the liability to repair the chancel. That which they received is wholly dedicated, by the section which I have read, to other charitable purposes. The view which I have formed as to the construction of sect. 28 does not, it seems to me, make it necessary for me to examine in detail the provisions of any other section. Suppose I assume in favour of the plaintiffs that the liability of a tithe rentcharge owner to repair the chancel is part of the ecclesiastical law referred to in sect. 3—as, indeed, I think it is—and suppose I assume that this liability does not come within the words " subject . . . to all tenancies, charges, and incumbrances, and to all rights and interests saved by this Act, affecting the property " (and I think it may well be that this assumption is also well founded), the plaintiffs still, in my view, remain under this liability, by reason of the provisions of sect. 28. I may add that, in the course of the argument, each side has drawn attention to certain difficulties which would arise if I accepted the argument of the other, and no doubt each side will again call attention to those difficulties if this case is considered by any other court. For my part, I do not propose to discuss those difficulties in detail, although they have been argued with great skill and ingenuity.

It seems to me that, if I have construed sect. 28 correctly, it affords a safe anchorage in what I think I might fairly describe as a sea of doubt and difficulty. The result is, on the view which I take of sect. 28, that the plaintiffs, as owners of the tithe rentcharge, will be liable to repair the chancel immediately prior to Oct. 2, 1936, unless some statutory provision relieves them of that liability. Sect. 28, as I read it, says that nothing in the 1914 Act is to affect that liability, and it is not suggested that there is any other Act which so relieves them.

There is one other observation bearing on the construction of the 1914 Act which I desire to make. Immediately prior to the date of disestablishment, the rector was liable to repair the chancel, because he
A owned the tithe rentcharge. The 1914 Act deprived him of the tithe rentcharge, subject to certain provisions, to which I have not referred, for compensating him, and vested it in the plaintiffs. It is, of course, possible that the Act intended to give the property to the plaintiffs free from the liability to repair the chancel, and thus deprive the owners of
B the chancel of a very valuable right. It is also possible that, while in effect vesting the tithe rentcharge in succession in the plaintiffs and in the county council, the Act intended to exempt both the plaintiffs and the county council from the liability to repair. However, that seems unlikely, as there is this express exemption of the county council.
C Further, I would refer to the well-known rule, to which counsel for the first defendants referred me, which is referred to by BOWEN, L.J., in *Hough* v. *Windus* (3), at p. 237, as the recognised rule "that statutes should be interpreted if possible so as to respect vested rights." It is quite clear that the right of the owners of the church to require the
D chancel to be repaired is taken away in the case of the transfer to the county council, but to my mind it is not made clear by the Act that that right is taken away in the case of a transfer to the plaintiffs. In fact, as I have held, there are provisions which prevent that from being so. Had there been any doubt in my mind, however, I think that this
E principle might have been applied with force.

Counsel for the first defendants has pointed out—and it is quite true, to my mind—that the construction at which I have arrived has a very strange result, in this respect. The 1914 Act intended that ultimately the county council should get the tithe rentcharge free from any liability
F to repair the chancel. In the view which I take of this matter, the plaintiffs, as events have happened, had not ceased to be liable to repair the chancel before Oct. 2, 1936, and, as a result of that, as I read the Act of 1936, a portion, which may be a substantial portion, of the redemption stock to be issued on the redemption of the tithe rentcharge will go, not
G to the county council, but to the representative body, and it will so go by reason, and by reason only, of the fact that the plaintiffs had not transferred the tithe rentcharge to the county council before Oct. 2, 1936. By reason of that fact, if the argument for the representative body is right, as I have held it is, the county council will in effect be
H saddled with that very liability from which the Act of 1914 intended to free them, because a sum calculated with reference to the sum required for repairs will in fact be taken from the county council and given to the representative body. I entirely agree with the submission of counsel for the first defendants that that is a strange result, but, taking the view that I do of the construction of the Act of 1914, I think that it is a result

which necessarily follows from the language used in the Tithe Act, 1936. Whether or not it is a result which was foreseen by the framers of that statute I do not know, but it is a result which seems to me to follow from the language which has been used in the Tithe Act, 1936, and I must leave it at that. For these reasons, I answer both questions of the originating summons in the negative, and I shall make declarations accordingly.

Both questions answered in the negative. Parties to pay their own costs by agreement.

Solicitors: *R. Primrose* (for the plaintiffs); *Milles, Jennings White & Foster* (for the first defendants); *Official Solicitor to the Ministry of Agriculture* (for the second defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

A. LEWIS & CO. (WESTMINSTER), LTD. *v.* BELL PROPERTY TRUST, LTD.

[CHANCERY DIVISION (Simonds, J.), **February 7, 8, 1940.**]

Landlord and Tenant—Restrictive covenant—Restrictions on user of adjoining premises—Premises let to tobacconist—Adjoining premises let to caterers——Caterers selling cigarettes on premises—Business of "sale of tobacco cigars and cigarettes."

The defendants granted a lease of certain premises to the plaintiffs for the purpose of carrying on the business of tobacconists. *Inter alia*, they covenanted "not to suffer or permit to be used certain adjoining premises for the purposes of the business of the sale of tobacco cigars and cigarettes." Some few months later, they granted a lease of the adjoining premises in question to the A.B.C., who carried on the business of restaurateurs and caterers and afforded their customers the opportunity of buying cigarettes at the cash desk upon leaving the premises. On the facts, it was found that in isolated cases persons entering the restaurant purchased cigarettes without consuming meals or refreshments on the premises. Thereupon the plaintiffs claimed damages for a breach of the defendants' covenant, alleging that the defendants had suffered or permitted to be used the adjoining premises in question for the purposes of the business of the sale of tobacco, cigars and cigarettes:—

HELD: as the adjoining premises in question were not, on the facts, being used for the purposes of the sale of tobacco, cigars and cigarettes, there could be no breach of covenant, and the plaintiffs' claim failed.

[EDITORIAL NOTE. It has been increasingly common in cases where a tenant is restricted in his own use of premises for him to require from his landlord a covenant that the latter will not let adjoining premises without such a restriction on user as will prevent competition with him. There has always been a certain overlapping of trades, and this has largely increased in modern times, because the retailer is not supplied in bulk, but in small packages suitable to be sold to the public without further handling or packing. It is now a very simple matter for a tradesman to carry on a subsidiary business, and the question here dealt with then arises. This question is whether that business is so far subsidiary as not to cause a breach of the landlord's covenant.

AS TO RESTRICTIONS ON USER OF ADJOINING PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 225-229, paras. 247-249; and FOR CASES, see DIGEST, Vol. 31, pp. 166-169, Nos. 2996-3019.]

Cases referred to:

(1) *Buckle* v. *Fredericks* (1890), 44 Ch.D. 244; 40 Digest 325, *2748*; 62 L.T. 884.
(2) *Fitz* v. *Iles,* [1893] 1 Ch. 77; 31 Digest 160, *2938*; 62 L.J.Ch. 258; 68 L.T. 108.
(3) *A.-G.* v. *Plymouth Corpn.* (1909), 100 L.T. 742; 43 Digest 6, *14*.
(4) *Lumley* v. *Metropolitan Ry. Co.* (1876), 34 L.T. 774; 31 Digest 160, *2936*.
(5) *Wartski* v. *Meaker* (1914), 110 L.T. 473; 31 Digest 157, *2904*.
(6) *Stuart* v. *Diplock* (1889), 43 Ch.D. 343; 31 Digest 167, *3002*; 59 L.J.Ch. 142; 62 L.T. 333.

ACTION for damages for breach of covenant. The facts and arguments are fully set out in the judgment.

H. Wynn Parry, K.C., and *Frank C. Watmough* for the plaintiffs.

C. E. Harman, K.C., and *J. G. Strangman* (for *Andrew E. J. Clark*, on war service) for the defendants.

SIMONDS, J.: In this case, the defendants, Bell Property Trust, Ltd., by an indenture of lease of June 7, 1937, granted to the plaintiffs, A. Lewis & Co. (Westminster), Ltd., a lease of certain premises, No. 12, The High, Streatham High Road, in the county of London, for a term of 21 years from Mar. 25, 1937, at the rent in the lease mentioned. The lessees covenanted, amongst other things, that they would not, without the consent in writing of the lessors, use the premises for any purpose other than that of the business of tobacconists. Amongst other covenants the lessors, on their part, entered into a covenant with the lessees that they would

> . . . not at any time during the term thereby created and so long as the business of a tobacconist is carried on upon the demised premises suffer or permit to be used or give permission to be used by others any adjoining adjacent or neighbouring premises known as Nos. 1 to 22 The High for the purposes of the business of the sale of tobacco cigars and cigarettes as aforesaid whilst the said demised premises are being used for the purpose of such business as aforesaid. Provided always that if the lessees shall require the lessors to institute proceedings against any person or firm or company which may be carrying on the trade or business of the sale of tobacco cigars and cigarettes the lessors will upon receiving complete security for such costs as may be incurred or are likely to be incurred institute such proceedings as may be considered by the lessees to be appropriate.

That is the covenant which it is claimed has been broken by the lessors, the defendants in these proceedings.

Before I come to the further consideration of the covenant here in question, it is necessary to state the further and relevant facts. That being the covenant into which the lessors, the defendants here, had entered with the plaintiffs, on Sept. 8, 1937, some few months later, the defendants by an indenture of lease of that date granted to the Aerated Bread Co., Ltd. (which I will for short call the A.B.C.), a lease of premises immediately adjoining those demised to the plaintiffs—namely, Nos. 13 and 14, The High, Streatham High Road, for a term of 21 years from June 24, 1937, at the rent therein mentioned. In that lease, the lessees, the A.B.C., covenanted that, amongst other things, they would not during the continuance of the term without the consent in writing of the lessors use the demised premises for any purpose other than that of the business of a restaurant and tea-shop. There is nothing else in that lease to which I need refer.

That being the position, the A.B.C. duly opened their shop in the premises adjoining those of the plaintiffs, and, in the course of carrying on their business, they sell cigarettes. They sell them in this way. There is in this shop, as in other tea-shops, a cashier's desk, and in the desk there are arranged a number of packets of cigarettes which are available to be purchased by any customer of the tea-shop. It is common for a customer to purchase a packet of cigarettes upon leaving, when he pays his counter bill or his restaurant bill. No doubt there are other cases where the cigarettes are purchased either in the course of a meal or upon the customer entering the shop. It is said to be very rare—indeed, the cashier could call to mind no case—for a person to enter the shop for the purpose of buying a packet of cigarettes and no more.

In those circumstances, the question I have to determine is this. First of all, does the A.B.C. carry on upon these premises the business of the sale of tobacco, cigars and cigarettes? Secondly, if such a business is carried on upon these premises, have the defendants permitted or suffered the premises so to be used that they are liable upon their covenant with the plaintiffs? I think I may fairly say that this is a very puzzling point. Ultimately, I think that it is to be solved by asking oneself whether, upon the fair meaning of the covenant, and according to the ordinary use of language, it can be predicated of the A.B.C. that they there carry on the business of the sale of tobacco, cigars and cigarettes. This, I think, at least is clear. It cannot be predicated of the A.B.C. that they carry on upon these premises the business of tobacconists. I do not think that anybody, on being asked whether the A.B.C. carried on there the business of tobacconists, would answer that question in the affirmative.

Next I ask whether there is any difference for this purpose between carrying on the business of a tobacconist and carrying on the business of the sale of tobacco, cigars and cigarettes. One must give a meaning, if one can, to every part of an instrument carefully drawn and entered into between the parties, and, since the words "business of a tobacconist" and "business of the sale of tobacco cigars and cigarettes" occur in immediate proximity in the same clause, I must assume that some difference was intended between the two phrases. Therefore, I am disposed to think that here there is some difference between the two, and that, even though the business of a tobacconist as a whole was not carried on, yet the provision would be infringed if it could fairly be said that the business of the sale of tobacco, cigars and cigarettes was carried on. Therefore, I have to consider that question.

I find it difficult to take the view that anybody on being asked, "What is the business which the A.B.C. carry on at this shop ? " would say : " They carry on several businesses. They carry on the business of selling refreshments. They carry on the business of selling (it may be) confectionery. They carry on the business of selling tobacco, cigars and cigarettes." I do not think that, according to the ordinary use of language, and upon the plain meaning of the covenant, that is an interpretation which could fairly be given to it. In my view, what is done at these premises is the carrying on of the business of a tea-shop and restaurant, and that involves, amongst other things, the sale of cigarettes. It is common—indeed, I am told that it is almost universal—for cigarettes to be sold in tea-shops of this character. Accordingly, it appears to me that it is no more right to predicate of this shop that there is carried on there the business of the sale of tobacco, cigars and cigarettes than it is to say of it that there is carried on there the business of the sale of milk, or the business of the sale of confectionery. There is carried on there the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold. It is, of course, quite true that I was referred to a number of authorities where it could fairly be said that more than one business was being carried on—as, for instance, in *Buckle* v. *Fredericks* (1). There the prohibition was against the trade, not the business, of, amongst other things, the retailing of wines, spirits or beer. In that case, the defendant, who was the lessee of a theatre, bought a piece of land adjoining his theatre, and erected thereon a building which served at once as a convenient egress from his theatre and as a place where refreshments might be sold. Therefore, he erected a counter for that purpose. It was held that, in addition to the business of a theatrical manager, he carried on the trade of a retailer of wines and spirits. The latter might be ancillary to the former, but it was a business which he carried on. It seems to me, if I may say so with respect, that it was impossible to come to any other conclusion in that case.

So also in *Fitz* v. *Iles* (2). There the defendants were bound by a covenant in the lease of their house not to use it as a coffee house. The defendants were dealers in tea, coffee and other groceries, but they proposed, as ancillary to their business, and for the convenience of their customers, to sell light refreshments, consisting of cups of tea and coffee, bread and butter, pastry, ham sandwiches and pork pies, to be consumed on the premises. The Court of Appeal, affirming NORTH, J., came to the conclusion in that case that the defendants were carrying on the business of a coffee-house keeper, and so clearly they were. They were carrying on the business of a coffee-house keeper as well as that of a grocer. Upon the facts of that case, it appears to me that no other conclusion could have been reached.

Again, I was referred to *A.-G.* v. *Plymouth Corpn.* (3) for the proposition, which, indeed, is self-evident, that a man may be said to carry on a particular trade though he does not carry it on in all its branches.

Thus, I would be prepared to concede that a man may carry on the business of a tobacconist although he does not carry it on in all its branches. I ventured to point out, in the course of the argument, that as it is true of a trade, so it is true of a profession. A barrister may be said in the fullest sense to carry on his profession, although he does not profess to do all things which other barristers may do. Thus, he may equally decline to settle a disentailing assurance or to prosecute at the Old Bailey.

Other cases have been cited, such as *Lumley* v. *Metropolitan Ry. Co.* (4) and *Wartski* v. *Meaker* (5). In each of them, the test is the test of broad common sense and the meaning of the covenant.

I think I need only refer to one other case in detail—namely, *Stuart* v. *Diplock* (6). In that case, the plaintiffs carried on the business of ladies' outfitters, juvenile outfitters and the selling of baby linen. The defendants, who were assumed in that case to be under a covenant not to carry on those businesses, carried on a business which they described as fancy drapers and hosiers. In the course of that business, they sold articles which would, in the normal course, be sold by a ladies' outfitter. Therefore, said the plaintiffs, the defendants had committed a breach of the covenant. Kekewich, J., held that they had not committed a breach, but the Court of Appeal took a different view. The view of the Court of Appeal is perhaps most happily expressed in the judgment of Bowen, L.J., where he illustrates the fallacy of the argument by the following syllogism, at p. 352 :

> " All ladies' outfitters sell combinations, the defendants sell combinations, therefore the defendants are ladies' outfitters." I do not think that a covenant not to carry on the business of a ladies' outfitter is broken by carrying on a part of that business, which is also a part of another distinct business, even though it be a substantial part of the business of a ladies' outfitter and only a subordinate part of the other business.

The syllogism which Bowen, L.J., stated there, translated into terms of this case, would be : " The business of the sale of tobacco, cigars and cigarettes consists in selling tobacco, cigars and cigarettes. The A.B.C. tea-shop sells cigarettes. Therefore, the A.B.C. tea-shop carry on the business of selling tobacco, cigars and cigarettes." That, of course, is a fallacy. The tea-shop do not carry on the business of a tobacconist, or the business of selling tobacco, cigars and cigarettes, because, as part of their business, they sell cigarettes, any more than they carry on, in ordinary parlance, the business of a retailer of milk because, in the course of their business, they sell milk, either in glasses or as an ingredient of a cup of tea.

Therefore, a review of all the authorities leads me back to exactly the impression which I formed upon first reading this covenant. It is simply a question of the ordinary use of language whether or not one can predicate of the A.B.C. that they carry on upon these premises the business of selling tobaccos, cigars and cigarettes. The conclusion to which I come now is the conclusion to which I came at the outset of the case—

namely, that one cannot fairly predicate of the A.B.C. that they are carrying on that business.

Supposing I am wrong upon that, then the difficult question arises whether that which is being done is being, or has been, permitted or suffered by the defendants. If it were necessary to form a final con-
A clusion upon that point—which it is not, in view of the decision to which I have come upon the first point—I should want a further consideration of the matter. I merely throw out this suggestion. No case has been cited to me which, in my view, involves the proposition that a person who has entered into such a covenant as this and then demised the
B premises for a purpose which he knows, or ought to know, would involve the prohibited user is entitled to rely upon that fact, and say: "I am not liable. I have not permitted this, because I have put it out of my own power to prevent the user for the purpose of which I have demised the premises." It is not necessary to come to a final conclusion upon
C that matter, because, in the view which I take upon the first point, the question does not arise. In the result, the action must be dismissed, with the usual consequences.

Judgment for the defendants with costs.

Solicitors: *Zeffertt & Heard* (for the plaintiffs); *Simmons & Simmons*
D (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

RAPPAPORT *v.* LONDON PLYWOOD AND TIMBER CO., LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **February 5, 6, 7, 8, 1940.**]

Sale of Goods—Non-delivery—Purported compliance with control order—Measure of damages.

Emergency Legislation—Timber control—Purchaser to whom property in timber has passed—Whether restrictions apply—Control of Timber (No. 1) Order, 1939 (*S.R. & O.,* 1939, *No.* 1031), *art.* 1—*Control of Timber (No. 5) Order,* 1939 (*S.R. & O.,* 1939, *No.* 1329), *arts.* 1, 2, 3. A

The plaintiff had, before the coming into operation of the Control of Timber (No. 1) Order, 1939, purchased certain timber (and it was held that the property in the timber had passed to him), but had not B taken delivery, the timber being left in the warehouses at the docks with the defendants' other stock. The order provided that no person should dispose of any timber to any other person beyond a certain quantity, and a later order provided that no person should acquire timber for consumption except under licence from the Minister of Supply :—

HELD : (i) the orders did not prevent the plaintiff from taking delivery C of timber bought before it came into force.

(ii) the defendants, having refused delivery by reason of the orders, were liable in damages to the plaintiff for non-delivery.

[**EDITORIAL NOTE.** In this case, the construction of the Control of Timber Orders is dealt with, and the orders are held to have no application to prevent D or restrict the delivery of timber to a person to whom the property in the timber has passed before the orders came into operation. Where delivery is wrongfully withheld, the purchaser will have a claim for damages for non-delivery.

AS TO DAMAGES FOR NON-DELIVERY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 194-197, paras. 260, 261 ; and FOR CASES, see DIGEST, Vol. 39, pp. 668-677, Nos. 2563-2632.]

E

ACTION for a declaration that the defendants were bound to deliver certain timber sold to the plaintiff upon the payment of certain bills of exchange. The plaintiff also claimed delivery of the quantity found due and damages for non-delivery. The plaintiff was a manufacturer of furniture, and from time to time purchased varying quantities of F timber from the defendants. Payment for the timber had been made by bills of exchange payable at 3 or 4 months. The timber was invoiced to the plaintiff, who took delivery against his acceptances in the quantities which he required from time to time. In the meantime, the goods remained warehoused at the docks with the defendants' other stock, G and in all cases bore distinctive marks by which they could be identified as the timber invoiced to the plaintiff. The terms of credit arranged between the parties had varied from time to time, but on Oct. 9, 1939, the total sum paid by the plaintiff against which he had not had delivery of timber amounted to £142 3*s*. 3*d*. On Oct. 14, 1939, the defendants H finally refused to make any further deliveries of the timber earmarked for the plaintiff until a number of bills of exchange which the plaintiff had accepted in the ordinary course of the dealings between the parties had been met.

The defendants raised various defences on the facts, but these were decided against them by the judge, who held that, in the circumstances of the case, the property in the timber had passed to the plaintiff. The defendants pleaded that the plaintiff had not at any time since Oct. 3, 1939, had a licence to acquire or take possession of the timber, or, alternatively, had not produced any such licence, and that, in conse- A quence, the delivery by the defendants and the acceptance by the plaintiff would have been illegal, since such a transaction was forbidden by the Control of Timber Orders, 1939. The case is reported only in so far as it deals with the construction of these orders, which were made by the Minister of Supply under the Defence Regulations, 1939, B regs. 55, 98.

The Control of Timber (No. 1) Order, 1939, art. 1, provides as follows:

> No person shall dispose of, or agree or offer to dispose of, any quantity of timber situate in the United Kingdom to any other person or invite an offer to acquire any C quantity of any such timber, if that quantity or the aggregate quantity produced by adding that quantity to the quantity of all such timber (being timber of the same category according to the classification of categories in the first schedule hereto) disposed of or agreed to be disposed of by the same person since the coming into force of this order (excluding any timber in relation to which the provisions of this article do not apply) exceeds 10 per cent. of the aggregate quantity of all such timber of the same category owned by that person at the coming into force of D this order and all such timber of that category coming into the ownership of that person in the United Kingdom since that time . . .

Then follows a proviso which is not material for the purposes of this case. The Control of Timber (No. 5) Order, 1939, art. 1 (1), provides as follows:

E

> No person shall acquire or agree or offer to acquire for consumption any timber or boxboards except under the authority of a licence granted by the Minister of Supply or in accordance with a special or general direction issued by the Minister of Supply.

F. Hallis for the plaintiff.

F *A. W. Roskill* for the defendants.

ATKINSON, J.: The third point which is raised in this case is the defence that the plaintiff has not at any time since Oct. 3 had a licence to acquire and take possession of the timber, or, alternatively, that he G has not produced a licence. The defence then goes on to say that both delivery by the defendants, and, indeed, acceptance by the plaintiff, would be illegal, because such a transaction was forbidden by various Control of Timber Orders. That defence has involved consideration of the true meaning of a number of orders which have been made under H the Emergency Powers (Defence) Act, 1939. The first one, the Control of Timber (No. 1) Order, 1939, dated Sept. 1, 1939, and coming into operation on the same day, by art. 1 provides as follows:

> No person shall dispose of, or agree or offer to dispose of, any quantity of timber . . . [in excess of] 10 per cent. of [his stock] at the coming into force of this order and all such timber of that category coming into the ownership of that person in the United Kingdom since that time . . .

That means 10 per cent. of his stock and 10 per cent. of any additions to his stock. It is just as well, when we are thinking of the clause, to remember that the definition of "dispose of and acquire" includes the giving and taking of possession. Therefore, this clause really means, for the purpose of this case, that no person shall give possession of, or dispose of, any timber in excess of 10 per cent. of his stock to any other person. One thing is quite clear, and that is that that prohibition only applies to owners, because, when dealing with the 10 per cent., it uses the words:

> . . . exceeds 10 per cent. of the aggregate quantity of all such timber of the same category owned by that person at the coming into force of this order and all such timber of that category coming into the ownership of that person in the United Kingdom since that time . . .

Art. 3 provides as follows:

> No person shall acquire, or agree or offer to acquire . . . any timber . . . unless that person is (*a*) a person requiring the timber for his own use or for use in his business . . .

Therefore, by art. 1 the plaintiff did not come within that prohibition. It is obvious that there is nothing in that order which affected this transaction. The defendants were not owners of this timber. The plaintiff was the owner, and it is only a prohibition against owners disposing of timber. I should add that, even if one is wrong as to that, there is no evidence whatever that these deliveries would have exceeded 10 per cent. of the stock of the defendants. A further order, the Control of Timber (No. 3) Order, 1939, was made on Sept. 15, 1939, increasing the 10 per cent. to 15 per cent. The order which is most material in this case is the Control of Timber (No. 5) Order, 1939, dated Sept. 30, 1939, which came into operation on Oct. 4, 1939. Art. 1 (1) provides as follows:

> (1) No person shall acquire [which includes shall take possession] or agree or offer to acquire for consumption any timber or boxboards except under the authority of a licence granted by the Minister of Supply or in accordance with a special or general direction issued by the Minister of Supply.

That is a prohibition on anybody acquiring timber, including taking possession for the consumption of that timber. Art. 1 (3) provides as follows:

> (*a*) No person who has acquired any timber or boxboards otherwise than for consumption shall without the permission of the Minister of Supply consume such timber or boxboards.

Art. 2 (1) provides as follows:

> No person shall dispose of or agree or offer to dispose of for consumption any timber or boxboards except to a person who produces a licence. . . .

Then there is an exception to these provisions of timber up to the value of £20, on a declaration by the buyer that that, with any other purchases he has made, will not exceed £20 per month.

The point for decision seems to me to be this. Does the word "person" mean in this order what it means in the earlier order? In the earlier order, it is quite clear that "person" means "owner." It is suggested here that "person" means anybody who happens to have possession of timber, although he may be holding it on behalf of somebody else, who is the real owner. I cannot see why I should give to the words "no person" there a different interpretation from that which is clearly intended by the earlier order. It seems to me very difficult to read an order in this way, and to say that it means: "No owner shall get possession of his own timber without producing a licence." It would need very strong language, I think, to justify an interpretation of that kind. There are two directions given under that order which, I think, support the interpretation which I intend to put upon the word "person" in the Control of Timber (No. 5) Order, 1939. The second direction is as follows:

> Any person disposing of any timber from his "private stocks" shall . . . forward a certified return of such disposals . . .

The words "private stocks" are defined as meaning all timber owned by any person other than timber acquired from or through an agent of the Minister of Supply. Taking all these orders together, I think it quite clear that it is only imposing restrictions on owners parting with their timber. At any rate, it cannot possibly include a prohibition against people who are already owners taking possession of timber which is in truth their own. There could be no object in such a prohibition. It makes no difference either to the public interest or to the Timber Control whether the timber is in the possession of A or B. One would have thought that it would have been best for the timber to be in the possession of its true owner, and I can see nothing to prohibit the true owner from getting possession of the timber which is his. Therefore, in my judgment, there is nothing in this plea either.

I now come to the relief to which the plaintiff is entitled. There is no difficulty about a declaration that the undelivered balance is the property of the plaintiff. There is no difficulty about a declaration that the defendants are legally bound to give to the plaintiff delivery orders for that timber without production of licences, and there is no difficulty which I can see about ordering delivery of the timber to the plaintiff. The plaintiff is not satisfied with that. He claims, in addition, damages, and bases that claim on these grounds. On Jan. 1, 1940, an order came into operation which restricted the use to which he could put his timber, and he says that, if this timber had been delivered at the end of Sept., 1939, or the beginning of Oct., 1939, he would have had a free hand as to the use to which he could have put it. His business is to make suites of bedroom furniture, and he has given very inadequate particulars of the loss of profit which he would have made if this timber had been available to him. Since Jan., 1940, he has not been in a position to carry on his business on account of the restrictions imposed on user and because, of course, he has not had the timber. It seems to me that he is entitled to some damages for the wrongful withholding of that timber.

Declaration accordingly and matter referred for inquiry as to damages.

Solicitors: *Alec Woolf & Turk* (for the plaintiff); *Rundle & Hobrow* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MURRELL S.S. CO., LTD. *v.* NORDENFJELDSKE STEAMSHIP SERVICES, LTD.
THE THURSTON.

[Court of Appeal (Scott, MacKinnon and Clauson, L.JJ.), **February 1, 1940.]**

Shipping—Charterparty—Expenses of discharging cargo—" Charge not to exceed what other steamers pay (at London according to the tariff in force on Jan. 1, 1935)"—Alternative maximum charges—Right of charterers to retain rebate allowed by stevedores.

The respondents owned the Thurston, a ship which was chartered by them to the appellants for the purpose of transporting a cargo of fresh fruit from Spain to England. The charterparty provided, *inter alia*: "Cargo to be brought to and taken from alongside at merchant's risk and expense and to be properly stowed and discharged by a regular stevedore appointed by charterers or their agents at the risk and expense of the steamer. The steamer to be discharged in the customary manner and where ordered by charterers or their agents. The charge not to exceed what other steamers pay (at London according to the tariff in force on Jan. 1, 1935)." The cargo was discharged at London, and the charterers claimed that they were entitled to debit the shipowners with a sum about twice as large as that paid to the stevedore for discharging the cargo, on the ground that the words in brackets meant that the shipowners were liable to pay the actual rate in the Port of London Authority's printed tariff in force on Jan. 1, 1935, and that the preceding words applied only if the ship were unloaded at a port other than London:—

Held: (i) the appellants were not entitled to debit the shipowners, as expenses for unloading the cargo, with a sum exceeding that actually charged by the stevedore for doing the work.

(ii) a bonus allowed by the stevedore in respect of the berthing of he vessel is not an allowance made by him in respect of the discharging of the cargo.

[**EDITORIAL NOTE.** The question of construction here is one of importance, as it involves a large number of transactions, and the construction adopted by the court is said to run counter to the general view which has up to now been held in the trade.

As to Construction of Clauses providing for Charges for Loading or Unloading, see HALSBURY, Hailsham Edn., Vol. 30, pp. 456-458, para. 614; and for Cases, see DIGEST, Vol. 41, pp. 311-314, Nos. 1718-1748.]

Appeal by the defendants from a judgment of Goddard, L.J. (sitting as an additional judge of the King's Bench Division), dated July 28, 1939. The parties to the action were the shipowners as plaintiffs and a firm acting as ship's agents, who were agents for the charterers. The charterers were brought in as a third party, their agents claiming to be indemnified by them, but they took no part in the appeal. The facts and the material parts of the charterparty are fully set out in the judgment of SCOTT, L.J.

A *H. U. Willink, K.C.*, and *R. A. B. Powell* (for *A. A. Mocatta*, on war service) for the appellants.

C. T. Le Quesne, K.C., and *A. W. Roskill* for the respondents.

Willink, K.C.: The ship must discharge the goods by the hands of a regular stevedore. The work of the stevedore is at the risk and expense B of the steamer. The shipowner desires to protect himself, in a measure, against the charge which the stevedore appointed by the charterers or their agents is going to make. The charterparty provides, by cl. 25, that the charge is "not to exceed what other steamers pay (at London according to the tariff in force on Jan. 1, 1935)". That means that at C all ports except London the shipowners are to pay the customary charge. At London, however, they are to pay this charge, not limited by the current rate, but limited by what was current 2 years previously. It is clear, from cl. 26 of the charterparty, that the shipowners were willing not to claim money which the agents received from the wharf. It was D contemplated that a stevedore might offer a bonus to the charterers or their agents to bring the ship to a particular wharf. The primary question is as to the true meaning of the language. The primary meaning of the word "tariff" is a list of charges which can be found and identified. The shipowner has not the right to interfere in the E contract between the charterer and the stevedore, because he has given the charterer the right to appoint the stevedore. The effect of cl. 24 is to enable the charterer to make an independent contract with the stevedore. The vital clause is cl. 25, which states that the charge is "not to exceed what other steamers pay (at London according to the F tariff in force on Jan. 1, 1935)". The words in parenthesis must be construed as an independent provision. The only tariff in force in London on Jan. 1, 1935, was the Port of London Authority's printed tariff, which was used by all. It was the invariable practice for shipowners to be charged in accordance with that tariff. The charge of 16*s.* less 10 per G cent. was in accordance with that tariff. That was what the shipowners promised to pay, and they have not been debited with a penny too much. A special provision has been made for London, and nothing is said about "exceeding," or "other steamers." That is the true construction.

H Counsel for the respondents were not called upon.

SCOTT, L.J.: The dispute here is between shipowners and a company acting as ship's agents. The trade in which the transaction took place was the export of fresh fruit from Spain to England in 1937 on the Thurston, a ship owned by the plaintiffs in the action, the

respondents here, and chartered by them to the defendants, the appellants here. The dispute relates solely to a question of an expense incurred, for which, under the charter, the shipowners accepted liability, in transferring the cargo from the hold of the ship on to the quay, the obligation under the charterparty being to place the goods alongside. The division of functions between ship and merchant was A
not at the ship's rail, but was a little further from the hold than that—namely, actually on the quay.

Clause 24 of the charter, provides as follows :

> . . . cargo is to be brought to and taken from alongside at merchant's risk and expense, and to be properly stowed and discharged by a regular stevedore appointed B
> by charterers or their agents, at the risk and expense of the steamer . . .

The stevedore was to be wholly under the direction of the master. In the particular case, the ship was consigned to London. The payment of chartered freight was by a lump sum of £4,500, the ship undertaking to bear the expense of putting the cargo on the quay at port of arrival. C
What happened, shortly, was that the ship's agents appointed by the charterers, the defendants in the action, employed a stevedore to discharge the cargo, and the stevedore, in performing that operation, performed the first part of it, in my opinion, on behalf of the ship—namely, to the point where the goods reached the quayside—and in D
respect of that portion of the operation the defendants deducted, in their account rendered of the ship's expenses and receipts, a larger sum than was in fact retained by the stevedore as his remuneration for performing that part of the work. They contended that, under the terms of the charterparty, they were entitled to debit the shipowner with a sum which E
was practically twice what the stevedore in fact retained for doing the work. The shipowner complained, on ascertaining what the position was, and asked for a credit to him, or for payment to him, of the difference. When the ship's agents refused, he issued a writ against them, and it was that issue which came up for trial before the judge. F

The question turned on the realities of the case, with which were mingled questions of the practice at the Port of London. To appreciate them, it is necessary to look at some clauses of the charterparty, dated Dec. 22, 1936, and made between the shipowners and the charterers, who were known in the case by the initials of their name, C.L.U.E.A. Clause 1 G
said that the steamer should proceed to a port on the east coast of the United Kingdom. Clause 24 provides as follows :

> The cargo to be brought to and taken from alongside at merchant's risk and expense, and to be properly stowed and discharged by a regular stevedore appointed by charterers or their agents, at the risk and expense of the steamer. H

The facts are not in dispute here, and were found by GODDARD, L.J., who tried the case. The stevedore was appointed by the charterers or by their agents in London—in fact, by their agents, the Nordenfjeldske Steamship Services, Ltd., who act as agents for ships of any owner and also as managers of a line of Norwegian ships. The words " at the expense of the steamer" are words which, to my mind, are quite unambiguous. They provide that the shipowner will defray the actual cost of the discharge on to the place where the shipowner's duty ends—namely, the quay alongside the ship—and no more, the stevedore in that operation being under the direction of the master.

A The dispute arises out of cl. 25, which provides as follows:

> The steamer to be discharged in the customary manner and where ordered by charterers or their agents.

That took place, and nothing turns on that. Then cl. 25 continues as follows:

B

> The charge not to exceed what other steamers pay. . . .

There is no ambiguity in that, and there is no doubt thrown by those words on the meaning of the word "expense" in cl. 24. Those words leave that word as meaning the actual expense incurred by paying to C the stevedore the amount for which he is willing to do the work. The dispute arises out of the words in brackets which immediately follow:

> . . . (at London according to the tariff in force on Jan. 1, 1935). . . .

The rest of the clause is immaterial. It is said that those words in D brackets do not mean what the preceding part of the sentence must necessarily mean—namely, that that is to be a maximum higher than which the actual expense which the steamer agrees to bear shall not go. It means, on the contrary, nothing to do with the maximum. It means that at London the expense of discharge should be according to a E particular printed tariff of the Port of London Authority in force on Jan. 1, 1935.

My first answer to that argument is that I see no reason in the language of the clause to give those words a sense which seems to me artificial. I construe the bracketed words as governed by the preceding words— F namely, "the charge not to exceed what other steamers pay"—and that that provision of a maximum charge which the steamer has undertaken to bear shall not be exceeded, not only at other ports, but also at London. That is the first answer to the appellants' argument in the present case. If that is a mere maximum, it does not matter what it G is. It may have been considerably higher than the charge which was in fact retained by the stevedore in the present case and kept in his own pocket in the ultimate result. It would not entitle the agents to claim to put upon the owners in their account a figure any higher than the actual charge, because nothing higher than that would be the expense H of discharging.

However, there is another answer to the argument, which involves some little statement of the facts. At the time referred to in the bracketed clause, the Port of London Authority had what may be called a tariff which was printed and published, the Port of London Authority being themselves engaged in the work of discharging ships to the extent of some 10 per cent. of the total tonnage discharged in the Port of London. In regard to fruit, in the little booklet, issued in 1932, one finds this passage, at p. 29 :

> **Fruit, green, in packages from Spain, Portugal and Italy, per 100 packages 16*s*. on to the quay.**

Then there was a reduction of 10 per cent. applying to all the charges on the page, and all through the book. At the time when this booklet was issued, or, at any rate, at a later date—namely, Jan. 1, 1935, which is the date referred to in cl. 25 of the charterparty—that was not the actual charge ever made by stevedores. The charge made by them at that time was 16*s*. per 100 packages, less 1*d*. for each package—that is to say, 8*s*. 4*d*.—and, if one takes 8*s*. 4*d*. from 16*s*., the actual gross rate, apart from percentage reduction, was 7*s*. 8*d*., and the evidence in the case as found by the judge—and I agree entirely with him, after having my attention directed to the whole of the evidence which was taken before him, of which we have had a transcript put before us—is quite clear that the actual current charge for which the stevedore was willing to do this part of the work throughout the Port of London was 7*s*. 8*d*., less 10 per cent.

On Apr. 1, 1935, a new schedule of charges which would equally come within the word " tariff " of the charterparty was made, and there the charge for green fruit in packages from Spain and Portugal was reduced to what was really the current charge—namely, 7*s*. 8*d*. per 100 packages—and, as a matter of fact, the scale of percentage deduction to get at the net charge was reduced from 10 per cent. to 7½ per cent., so that the reduction was not as great as before, and a smaller subtraction from the rate of 7*s*. 8*d*. was in fact made. Of course, however, that tariff, which was published on Apr. 1, 1935, was not, and could not be, of itself the tariff in force on Jan. 1, 1935, because it had not been published at that date, and had not come into use in that form.

That leads to a third question of interpretation of cl. 25, and that is this. The words in brackets, even if they ought to be interpreted as having nothing to do with a maximum, refer only to the tariff in force. They do not refer to the Port of London Authority's printed tariff, or contain any reference to a particular printed document, and the tariff in force on Jan. 1, 1935, was that which had prevailed through the preceding years, and which, except from the point of view of the percentage, was in force on Jan. 1, 1935, and was repeated in express terms in the Port of London Authority's booklet of tariff charges on Apr. 1. Therefore, in my opinion, the insertion of the words " Jan. 1, 1935," makes no difference, so far as regards the deduction from the gross rate of 16*s*., which had nominally prevailed, of 1*d*. per package, reducing it in fact to 7*s*. 8*d*. GODDARD, L.J., gave judgment for the difference between the two points of view, making it £111 3*s*. 2*d*. as the overcharge which the agents had made against the ship, and gave judgment in favour of the shipowner for that amount. That difference included in the calculation upon which it was based the difference in the percentage deduction between 10 per cent. and 7½ per cent., and on that there is no dispute.

An argument was adumbrated, but not pressed, on behalf of the agents that cl. 26 was helpful, not directly, but indirectly, as throwing light upon the meaning of cll. 24 and 25. Clause 26 reads as follows :

> Steamer to be cleared by charterers' agents at loading ports and also at port or ports of discharge. Any bonus or other usual pecuniary consideration allowed by stevedore and/or wharfinger or dock company in respect of the berthing of the vessel to belong to agents or charterers and owners to have no claim thereto.

There is an express provision giving, in certain circumstances, a right to the agents or charterers to an allowance of a special bonus paid to them, and the shipowner disclaimed any right to it. The first reflection which occurs to one on that is that, that being an express exception to the shipowner's right to be charged only with actual expenses, it goes to indicate even more strongly that it was his right to be charged only actual expenses, except in a mentioned case, as in cl. 26. However, the further objection is that, in my opinion, that provision has nothing at all to do with any rebate handed back by stevedores, or allowed by stevedores, to agents or charterers out of the nominal 16*s.* which they used to get. A bonus or pecuniary consideration allowed by a stevedore in respect of the berthing of the vessel is not an allowance made by him in respect of the discharging of the cargo from the hold to the quay alongside. The berthing of the vessel is what it says—namely, the operation of bringing the vessel to the berth—and that clause, in my opinion, has nothing whatever to do with the interpretation of cll. 24 and 25. For these reasons, I entirely agree with the judgment of Goddard, L.J., and think that the appeal ought to be dismissed.

MacKinnon, L.J. : I agree. This is a charterparty, and the main purpose of that contract is that the shipowner agrees to carry the goods of the charterer from Spain to the port of discharge. For his services in doing that the charterer is to pay him an agreed freight if the voyage merely takes a reasonable time, and an extra payment by way of demurrage if the voyage takes an excessive time. In addition to the cargo being carried from one port to another, it has to be put on board at the port of origin and taken out of the ship at the port of discharge, so provision is made for that. The charterer is to bring the cargo to a spot alongside the ship, and the charterer is to take the cargo away from a spot alongside the ship. As regards the process of loading it from alongside into the ship and discharging it to alongside out of the ship, it is provided that this is to be the duty and concern of the shipowner, and cll. 24 and 25 provide how he is to carry that out. I need not trouble about the words as to loading, but the material words as to discharging are the words in cl. 24 providing that the cargo is to be

> . . . discharged by a regular stevedore appointed by the charterers or their agents, at the risk and expense of the steamer.

That means that the shipowner says to the charterer: "You may appoint a stevedore, and I will pay his proper charges." After the charterer, or his agent, has appointed the stevedore, it is perfectly possible, and within the rights of the shipowner, for him to agree with the stevedore the price at which he is to do his work and to pay him direct. If, on the other hand, it is convenient, as a matter of business, he leaves it to the charterers' agents, who for certain purposes, he has agreed to accept as his agents under this charterparty. If he leaves it to the charterers' agents, he agrees to repay to the charterers' agents what they have in fact paid to the stevedore.

In this case, the charterers' agents did appoint the stevedore, and engaged him, and for the work he did the stevedore charged, and the charterers' agents paid him, £107 17*s.* 2*d.*, and quite clearly they can ask the shipowner *prima facie* to repay to them that sum of money which they have paid to the stevedore, and no more. The extraordinary feature of this case, however, is that the charterers say to the shipowner: "You must pay us, not £107, but £219 0*s.* 4*d.*, and we can ask you for that on the ground that, under this charterparty, you, the shipowner, have not only agreed to reimburse us the £107 17*s.* 2*d.* we have paid to the stevedores, but have also agreed to pay us, the charterers, £111 3*s.* 2*d.*" That, on the wording of the charterparty, so far as I have read it, seems a bold and extraordinary contention, but it is raised upon a few words in cl. 25:

> The steamer to be discharged in the customary manner and where ordered by charterers or their agents. The charge [which is to be made for which the shipowner makes himself liable to pay for the stevedore's services] not to exceed what other steamers pay (at London according to the tariff in force on Jan. 1, 1935). . . .

The whole of this contention that under this charterparty, though the stevedore's charges are only £107, the charterers are to get a *bonne bouche* of £111 rests upon an attempted construction of the words in that parenthesis.

I am quite satisfied of two things. First of all, the words in that parenthesis are words of limitation. They are co-ordinated with the first phrase, and stipulate that the charge is not to exceed (*a*) what the other steamers pay, and (*b*) in London, the amount according to the tariff in force on Jan. 1, 1935. Secondly, there is, of course, the question of what is that maximum which is there put in by way of limitation. What was the amount of the rate according to the tariff in force on Jan. 1, 1935? I am quite satisfied that the rate in force on Jan. 1, 1935, was 7*s.* 8*d.* per 100 cases. This ridiculous arrangement, under which somebody prints in a document 16*s.*, when everybody knows it is all nonsense, for it is 16*s.*, less 1*d.* per package, which is 7*s.* 8*d.*, renders the thing an absurdity. The rate, or the charge, according to the tariff in force on Jan. 1, was 7*s.* 8*d.*, and that is the precise rate charged by the stevedores, making up their £107 17*s.* 2*d.*, except that, if it had been on Jan. 1, 1935, there would have been 10 per cent. deducted from the

7*s.* 8*d.*, whereas on this stevedore's bill it was only 7½ per cent. That, and that alone, is the amount which GODDARD, L.J., has found he was liable to pay. I think that the judgment in that respect was perfectly right.

A CLAUSON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Constant & Constant* (for the appellants); *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, West Hartlepool (for the respondents).

B [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

N. V. AMSTERDAMSCHE LUCIFERSFABRIEKEN *v.* H. & H. TRADING AGENCIES, LTD.

C

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 12, 1940.**]

Practice—Costs—Counterclaim—Claim and counterclaim both successful—Claim admitted before trial—No costs on claim except for setting down.

D In an action which was remitted to the county court, the defendants in their defence admitted the plaintiffs' claim. There was, however, a counterclaim, which was the subject of dispute, the defendants ultimately succeeding on the counterclaim, though for a smaller amount than that claimed. The order drawn up adjudged that the plaintiffs should recover the amount of the claim and the costs of the claim, and E that the defendants should recover the sum awarded on their counterclaim and the costs of the counterclaim:—

HELD: by reason of the admission in the defence of the plaintiffs' claim, there were attributable to the claim no costs which had to be divided or apportioned as between the claim and the counterclaim. The plaintiffs' costs should have been taxed on the principle that, after F the admission of the claim, the plaintiffs were not entitled to incur any costs relating to the claim except those of setting down and obtaining leave to proceed, and the costs of the defendants should be taxed upon the principle that they were successful on the only matter litigated, but this would not affect any costs given to either party in any event.

[EDITORIAL NOTE. Where the plaintiff's claim is admitted and there is no G issue at the trial with reference to it, but the whole trial is devoted to the counterclaim of the defendant, the plaintiff is entitled, not to the general costs of the trial, but only to such costs as are necessarily incurred in setting down the action for trial.

AS TO COSTS WHERE CLAIM AND COUNTERCLAIM BOTH SUCCESSFUL, see HALSBURY, Hailsham Edn., Vol. 29, pp. 518-520, para. 768; and FOR CASES, H see DIGEST, Vol. 40, pp. 434-436, Nos. 552-568. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 366, 367.]

Cases referred to:

(1) *Saner* v. *Bilton* (1879), 11 Ch.D. 416; 40 Digest 436, *569*; 48 L.J. Ch. 545; 40 L.T. 314.

(2) *Christie* v. *Platt*, [1921] 2 K.B. 17; 40 Digest 436, *568*; 90 L.J.K.B. 555; 124 L.T. 649.

(3) *Wilson* v. *Walters*, [1926] 1 K.B. 511 ; 40 Digest 437, *571* ; 95 L.J.K.B. 624 ; 134 L.T. 597.

(4) *Medway Oil & Storage Co.* v. *Continental Contractors*, [1929] A.C. 88 ; Digest Supp. ; 98 L.J.K.B. 148 ; 140 L.T. 98.

(5) *Baines* v. *Bromley* (1881), 6 Q.B.D. 691 ; 40 Digest 433, *550* ; 50 L.J.Q.B. 465 ; 44 L.T. 915.

(6) *Atlas Metal Co.* v. *Miller*, [1898] 2 Q.B. 500 ; 40 Digest 437, *574* ; 67 L.J.Q.B. 815 ; 79 L.T. 5.

(7) *The Stentor*, [1934] P. 133 ; Digest Supp. ; 103 L.J.P. 105 ; 152 L.T. 450.

Appeal by the defendants from a judgment and order of His Honour Judge Sir Mordaunt Snagge, given at the Westminster County Court on Jan. 15, 1940. The facts are fully set out in the judgment of Slesser, L.J.

T. Humphrey Tilling for the appellants.

A. S. Diamond for the respondents.

Tilling : As the appellants were awarded judgment for the bulk of their counterclaim, they should have the costs of fighting it. The rule in *Christie* v. *Platt* (2) is not a settled rule, but is merely a caution to the taxing master that, in applying the rule in *Saner* v. *Bilton* (1), he must look at the substance of the action, and must not be enslaved by the form of the proceedings. *Medway Oil & Storage Co.* v. *Continental Contractors* (4) is to be distinguished, as it does not apply to a case in which, like this, there has been no issue on the claim.

Diamond : In the proceedings in the county court, the defendants relied upon a defence—namely, a set-off—and also on a counterclaim based on the same facts. The effect of the judgment of the judge is, therefore, that the counterclaim bears only such costs as were incurred by reason of the counterclaim. Subject to that, the plaintiffs obtain the costs of the proceedings, except such items as are common to both the claim and the counterclaim. [Counsel referred to *Saner* v. *Bilton* (1), *Baines* v. *Bromley* (5), *Atlas Metal Co.* v. *Miller* (6), *Christie* v. *Platt* (2), *Wilson* v. *Walters* (3), *Medway Oil & Storage Co.* v. *Continental Contractors* (4) and *The Stentor* (7).]

Slesser, L.J. : In this case, the Dutch company sued the English company, H. & H. Trading Agencies, Ltd., for the sum of £99 10*s.* 1*d.*, the price of goods sold and delivered and duty refunded, an agreed amount, less an amount of commission which had been paid by the plaintiffs to the defendants, so that the effective claim was for £92 9*s.* 10*d.*, the commission being £7 0*s.* 3*d.* An action for that amount was started in the High Court by specially indorsed writ, and was remitted to the county court, an affidavit being sworn by one Heney on behalf of the defendant company. In para. 4 of his affidavit, Heney says :

> The above-named defendant company purchased from the above-named plaintiff company a quantity of matches for its own account and in respect of these dealings there is a sum of money due to the plaintiff company. The defendant company has from time to time obtained orders on behalf of the plaintiff company for various

> quantities of matches and there is due to the defendant company commission on such orders amounting to the sum of £72 3*s.* 9*d.* The defendant company claims to set off the said sum of £72 3*s.* 9*d.* against the amount claimed by the plaintiff company, or alternatively, the defendant company has a counterclaim for the said sum of £72 3*s.* 9*d.*

Then, on the matter coming into the county court, there was put in a defence and counterclaim. Para. 1 of the defence is as follows:

> The defendants admit that the sum of £92 9*s.* 10*d.* was due from them to the plaintiffs as alleged in the statement of claim.

Subsequently they paid the sum of £20-odd, so that there remained owing to the plaintiffs £72 3*s.* 9*d.* There is no question about that at all, and there was nothing at all with regard to that matter to be litigated in the county court. There was really no dispute about that amount. It was a clean admission of liability. In the counterclaim, the defendants again raised the question mentioned in Heney's affidavit, which I have read, as to the sum of £72 3*s.* 9*d.* due by the plaintiffs to them for commission. On that, it was said, first of all that the sum was not due at all, and that it had not yet fallen due, and was not due till third parties, the customers, had paid the Dutch company, and, secondly, that, as regards one part of the claim relating to the North Borneo Estates—namely, a claim for £34 7*s.* 6*d.*—the commission should have been on a 5 per cent. basis, and not a 10 per cent. basis. On the general defence to the counterclaim—namely, that the commission was not due—the plaintiffs failed. As to the amount of the commission, it turned out in the result that the sum actually held to be owing was not £72 3*s.* 9*d.* It was £55, and the order which was drawn up, dated Nov. 15, 1939, was as follows:

> It is this day adjudged that the plaintiff in this action do recover against the defendant the sum of £72 3*s.* 9*d.* for debt. . . .

Then follows the matter of costs, which has produced this discussion, amounting to £74 16*s.* 9*d.*, a sum larger than the claim which the defendants in their defence had fully admitted, and on which there was really no litigation at all. Then it is further adjudged that the defendants do recover on their counterclaim against the plaintiffs the sum of £55 for debt and £39 14*s.* 2*d.* for costs. Then it is ordered:

> That the defendant do pay to the registrar of this court the sum of £52 6*s.* 4*d.* being the balance in favour of plaintiff after deducting the amount adjudged to the defendant as aforesaid.

Upon the amount being so taxed on that principle, there was an appeal to the judge, on the ground that this case was not in the class of cases where there were in issue a claim and a counterclaim, and where there had arisen the question whether, the claim and counterclaim being either, as the case might be, dismissed or allowed, the counterclaim should bear only the amount by which the costs of the proceedings had been increased by it, or whether it was a proper case for apportionment, but was one where there was no issue at all to be litigated in the county court, owing to the complete admission of the defendants on the claim, and, therefore, no costs attributable to that matter were to be divided or apportioned as between the claim and the counterclaim at all, and that difficult questions—raised in cases such as *Saner* v. *Bilton* (1), on the one hand, and *Christie* v. *Platt* (2), on the other (discussed in *Wilson* v. *Walters* (3)) —of apportionment, division or bearing of extra costs caused by a counterclaim did not arise, because this was in substance (and the court should look at the substance) a claim by the defendants only for the recovery of their commission when the matter reached the county court. That kind of argument apparently did not find favour with the county court judge, who upheld the decision of the registrar. In my view, however, the argument is a sound one. As ATKIN, L.J., has said in *Christie* v. *Platt* (2), we have to look at the substance of the matter, and we have not, as LORD BLANESBURGH pointed out in *Medway Oil & Storage Co.* v. *Continental Contractors* (4), to be enslaved by pleadings. Whether this claim of the defendants to recover commission—on which they succeeded, albeit they claimed for £72 and recovered £55—is to be regarded as a set-off or a counterclaim seems to me entirely irrelevant to anything which has here to be considered. That may well be important in questions of entering judgment and the like, but it is not relevant to the substance of the matter we have to consider here—namely, whether the defendants are entitled to the costs which they had to incur in the county court by reason of the plaintiffs resisting their claim for commission, having regard to the fact that the plaintiffs had brought an action in the High Court for a certain amount, which had been admitted in their favour by the defendants before the whole action really started in the county court, so that it was unnecessary that the plaintiffs should incur any further costs on it. In those circumstances, I think that the proper direction on which the registrar should have acted was this. He should have taxed the plaintiffs' costs on the principle that, after the defence was delivered in the county court, their claim was admitted, and they were not entitled to incur any costs relating to their claim except the costs of setting down and of obtaining leave to proceed, and that the costs of the defendants should be taxed upon the principle that they were successful on the only matter litigated in the county court, and that this order should not affect any costs given to either party in any event. That is the principle on which the taxation ought to proceed, and, as it is the principle which the appellants here have succeeded in establishing, they are entitled to succeed in this appeal, and the appeal should be allowed.

LUXMOORE, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *Theodore Bell, Cotton & Curtis* (for the appellants); *J. N. Nabarro & Sons* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

PERRY *v.* SOUTH METROPOLITAN GAS CO.

[CHANCERY DIVISION (Morton, J.), **February 23, 1940.**]

Emergency Legislation—Gas company cutting off supply—Realisation of security—Whether leave of court necessary—South Metropolitan Gas, Light and Coke Company Act, 1842 (*c. lxxix*), *ss.* 159, 161—*Courts (Emergency Powers) Act,* 1939 (*c.* 67), *s.* 1 (2) (*a*) (*iv*).

Gas—Recovery of charges—Cutting off supply—Gas charges prepaid by slot meter—Only outstanding charges for rent of apparatus—Right of company to cut off supply—South Metropolitan Gas, Light and Coke Company Act, 1842 (*c. lxxix*), *ss.* 159, 161.

The occupier of business premises was supplied by the defendants with gas through a slot meter. She also rented certain pans, stoves and other utensils from them, and was in arrears with her payments of rent in respect of these utensils to the amount of £62 15*s.* 5*d.* The defendants cut off the supply of gas to her, and it was contended that, as all the charges for the supply of gas had been paid and the only outstanding charges were those in respect of the hire of the utensils, the defendants had exceeded their statutory power in cutting off the supply of gas. It was also contended that the cutting off of the supply was a realisation of a security within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 :—

HELD : (i) the defendants had acted within their statutory powers in cutting off the supply of gas.

(ii) the cutting off of the supply of gas was not a realisation of a security within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1.

[**EDITORIAL NOTE.** The Courts (Emergency Powers) Act, 1939, is described in its preamble as conferring on the court certain powers in relation to remedies in respect of the non-payment of money. Although the Act deals specifically with nearly every form of remedy for recovering money, it has not made any reference to the statutory powers of public utility companies, which almost invariably include a power to determine the supply.

AS TO REMEDIES OF GAS COMPANIES, see HALSBURY, Hailsham Edn., Vol. 15, p. 593, para. 1028 ; and FOR CASES, see DIGEST, Vol. 25, pp. 476, 477, Nos. 36-46.]

MOTION for an injunction to restrain the defendants, their agents or servants from stopping the supply of gas, or causing or permitting the supply of gas to be stopped, to the plaintiff's premises. The facts are fully set out in the judgment.

Harry Lester for the plaintiff.

Roger W. Turnbull for the defendants.

Lester : The defendants have no right to cut off the supply of gas except in cases where gas itself is supplied on credit. In this case, gas was supplied through a prepaid slot meter. The plaintiff's only debt was in respect of hire-purchase instalments for gas fittings for her business. The object of the South Metropolitan Gas Company Act, 1842, s. 161, was to give the company a remedy by way of self-help for the purpose of preventing a gas consumer from increasing his indebtedness to the company. In any event, the exercise of such a remedy by the company is contrary to the Courts (Emergency Powers) Act, 1939,

s. 1 (2) (*a*) (*iv*). The preamble describes it as an Act to confer on courts certain powers in relation to remedies in respect of the non-payment of money. Clearly, the cutting off of the gas supply is a remedy exercised by the company because of the non-payment of money. The right to cut off the gas supply is a security given to the company to ensure payment of debts owing to them, and the exercise of this right may fairly be described as the realisation of a security by the company.

Turnbull: The money owed by the plaintiff under the hire purchase clearly comes within sect. 161 of the Act of 1842, and is, therefore, recoverable. Being a debt recoverable at law, it cannot be described as the realisation of a security by the company.

Morton, J.: In this case, the plaintiff, who is proprietress of a fried-fish-and-chips business at Herne Hill, asks for an injunction to restrain the defendants, their agents or servants, from stopping, or causing or permitting to be stopped, the supply of gas to her premises.

The plaintiff's affidavit states that in 1937 she hired from the defendants for the purposes of her business, at a monthly rental of £2 18*s*. 5*d*., certain pans, stoves and so on. She says that, owing to the difficulty of getting fish, and because of the war, she has fallen into arrears with the payment of instalments, and now owes the defendants a total of £62 15*s*. 5*d*. on the account. The gas used in the plaintiff's premises is supplied by the defendants, and is obtained through a slot meter. It is said by the plaintiff—and it is not disputed, as I understand—that there is not, and there never has been, owing to the defendants any sum whatever in respect of gas supplied to the premises. Again, it is stated by the plaintiff, and not disputed, that on Feb. 16 the defendants cut off the supply of gas, that, owing to the cutting off of this gas supply, she is entirely without means of livelihood, and that all the fittings of her premises are useless.

Whatever sympathy the court may feel with the plaintiff in the unfortunate circumstances in which she finds herself, it is, of course, the duty of the defendant company to endeavour to recover the moneys owing, and they are at liberty to exercise their statutory powers, so long as they do not exceed them. It is my duty to consider whether or not the plaintiff has made out a *prima facie* case that the defendants are not entitled to do that which they have done. The evidence for the defendants shows that on Oct. 5, 1938, they obtained judgment against the plaintiff for the sum of £55 1*s*., which included costs, and that the arrears due from the plaintiff to them now amount to £68 16*s*. 9*d*.

Counsel for the plaintiff raises two points in support of the motion. First of all, he says that the defendants have no power under the South Metropolitan Gas, Light and Coke Company Act, 1842, or otherwise, to do that which they have done. Sect. 159 of that Act provides as follows:

> The said company may let to hire any meter for ascertaining the quantity of gas supplied and any fittings for consuming gas at such rent or sum as shall be agreed upon between the parties and such rent or sum shall be recoverable in the same manner as other rents due to the company, and the said meter and fittings shall not be liable to any landlord's distress for rent of the premises.

Sect. 161 provides as follows:

> If any person supplied with gas by the company shall neglect to pay any rate, rent, or sum of money due to them at any of the times appointed for payment thereof, it shall be lawful for the company or their lessee to stop the supply of gas to such person by cutting off the service pipe to the premises of such person, or by such means as the company shall think fit . . .

It is submitted by counsel for the plaintiff that the words "rate, rent or sum of money" in sect. 161 do not apply to rent which is in arrears for the hire of fittings, and apply only to the charge for the use of gas. He says that, as there has been no default in payment for gas, sect. 161 does not come into operation. I cannot accede to that contention. It seems to me quite impossible to put such a limitation as that upon the wording of sect. 161. It is a fact that the defendant company have let to the plaintiff fittings for consuming gas, and it is a fact that rent is in arrear in respect of these fittings. That rent seems to me to come clearly within the provisions of sect. 161. The second point raised by counsel for the plaintiff is that the Courts (Emergency Powers) Act, 1939, prevents the defendants from cutting off the supply of gas without the leave of the court. He refers to the fact that this Act is described as:

> An Act to confer on courts certain powers in relation to remedies in respect of the non-payment of money and the non-performance of obligations (including powers in relation to bankruptcy and winding up proceedings), and to make provision for purposes connected with the matters aforesaid.

He also refers to sect. 1 (2) (*a*) (*iv*), and suggests that the cutting off of this gas is the realisation of a security by the defendant company. I cannot accede to that contention. It is an ingenious suggestion, but the short answer to it is, in my view, that by cutting off the supply of gas the company cannot be said to be realising a security at all. They are taking a step which was open to them under the Act to which I have referred, and the description of that as "realising a security" would be wholly inappropriate. Counsel for the plaintiff also says that, if it is not within the letter of the Act, it is within the spirit of the Act. However, I can only give effect to such provisions as I find in the Act. I may add that, even if I had thought that this case came within sect. 1 (2) of the Act, the plaintiff might have had some difficulty—I say no more—in satisfying the court that she was unable to pay the rent by reason of circumstances directly or indirectly attributable to the present war, having regard to the fact, so far as appears from the evidence, that she had fallen into arrears before the war began, although it may well be that the war has increased her difficulties. However, it is not necessary for me to express any opinion as to that. In my view, the plaintiff has not made out even a *prima facie* case for the relief which she claims, and this motion must be dismissed. A

Motion dismissed. Costs to be costs in action.

Solicitors: *Randolph & Dean* (for the plaintiff); *Hicklin, Washington & Pasmore* (for the defendants).

[*Reported by* Charles Newton, Esq., *Barrister-at-Law.*] B

FRIIS *v.* PARAMOUNT BAGWASH CO., LTD.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 6, 12, 1940.**]

County Courts—Costs—Remitted action—Action dismissed with costs—Defendants' right to High Court costs down to transfer and county court costs thereafter.

In a remitted action by an accountant for the balance of an account for professional services and sums paid on behalf of the defendant company, the county court judge on Oct. 11, 1939, on the application of the plaintiff, granted an adjournment, on condition that £10 on account of costs thrown away should be paid into court within 14 days, and, if the plaintiff failed to pay those costs, the action should stand dismissed with costs. The plaintiff did not pay those costs. On Nov. 17, 1939, the defendant applied for an order dealing with the outstanding costs, and an order was made dealing generally with the costs of the action. It was contended that the order of Oct. 11 could not be a final order, because the judge had to exercise his discretion as to how far the costs should be on the High Court scale and how far on the county court scale :—

HELD : (i) the order of Oct. 11 was final.

(ii) a successful defendant in a remitted action who is awarded costs without more is entitled to tax his costs down to the date of transfer on the High Court scale, and thereafter on the appropriate county court scale.

[**EDITORIAL NOTE.** The plaintiff, and not the defendant, has the choice whether an action shall be brought in the High Court or in the county court. For this reason, a successful defendant in a remitted action cannot be deprived of his costs on the High Court scale down to the date of transfer otherwise than by the exercise of that general discretion, vested in the judge, of depriving a successful party of costs.

AS TO COSTS OF REMITTED ACTION, see HALSBURY, Hailsham Edn., Vol. 8, pp. 357-360, paras. 758-762 ; and FOR CASES, see DIGEST, Vol. 13, pp. 490-492, Nos. 404-420.]

Cases referred to :

(1) *The City of Manchester* (1880), 5 P.D. 221 ; 30 Digest 132, *101* ; 49 L.J.P. 81 ; 42 L.T. 521.

(2) *Marsden* v. *Lancashire & Yorkshire Ry. Co.* (1881), 7 Q.B.D. 641 ; 30 Digest 132, *102* ; 50 L.J.Q.B. 318 ; 44 L.T. 239.

(3) *Forbes-Smith* v. *Forbes-Smith & Chadwick*, [1901] P. 258 ; 30 Digest 134, *127* ; 70 L.J.P. 61 ; 84 L.T. 789.

(4) *Badcock* v. *Hunt* (1889), 38 W.R. 255 ; 13 Digest 520, *704*.

(5) *Goadby* v. *Orridge*, [1938] 1 K.B. 641 ; [1937] 4 All E.R. 610 ; Digest Supp. ; 107 L.J.Ch. 313 ; 158 L.T. 51.

(6) *Fritz* v. *Hobson* (1880), 14 Ch.D. 542 ; 28 Digest 412, *370* ; 49 L.J.Ch. 321 ; 42 L.T. 225.

APPEAL by the plaintiff from an order made by His Honour JUDGE BENSLEY WELLS at Woolwich County Court on Nov. 17, 1939. The facts are fully set out in the judgment of the court delivered by SLESSER, L.J.

E. M. Hoy for the appellant.

H. J. Astell Burt for the respondents.

Hoy : Having made an order on a certain date, the judge had no power to vary it by an order on a later date. The first order, being signed and completed, was final, and the second was irregular, inasmuch as it purported to vary the first in any way. On the expiration of the 14 days from Oct. 11, the action came to an end. The judge was *functus officio*, and had no jurisdiction to make the second order.

Astell Burt: After judgment has been passed and entered, the court A
has jurisdiction to make a supplemental order as to costs if, and so far as, the costs have not been properly dealt with. [Counsel referred to *The City of Manchester* (1), *Marsden* v. *Lancashire & Yorkshire Ry. Co.* (2) and *Forbes-Smith* v. *Forbes-Smith & Chadwick* (3).] In a remitted action, the county court judge, under the County Courts Act, 1934, B
s. 73, must determine the question of High Court costs before the date of remission, and thereafter the scale or column of the costs in the county court. As the county court judge had never purported to exercise his discretion under sect. 73 when making the order of Oct. 11, it was open to the defendants to make the subsequent application: C
Badcock v. *Hunt* (4). [Counsel referred to *Goadby* v. *Orridge* (5) and *Fritz* v. *Hobson* (6).]

Hoy in reply.

Slesser, L.J. [delivering the judgment of the court]: The plaintiff D
sued the defendant company for some £40 alleged to be due for professional services as secretarial and accountancy charges on a balance of account. The action was started by specially indorsed writ in the High Court, dated Nov. 15, 1938. On Nov. 28, 1938, an order was made that the defendant company be at liberty to defend the action and E
that the matter be remitted to the Greenwich County Court. In the county court, the plaint was issued on Dec. 9, 1938, and a defence and counterclaim, the latter being for £28 18*s.* 3*d.* said to be money recovered by the plaintiff from the inland revenue authorities and converted by the plaintiff to his own use, instead of being accounted to the defendant F
company, and also for the return of certain books of the defendant company, and damages for their detention.

The case came before the county court judge on July 5, 1939, and, the plaintiff having given his evidence in chief, the cross-examination was adjourned until Oct. 11. On that date, the plaintiff being repre- G
sented by another counsel, who was not then ready to proceed with the argument, by agreement the following order was made:

> It is ordered that the hearing of this action be adjourned to a date to suit the convenience of both counsel. Costs thrown away to be the defendants' in any event. £10 to be paid into court by the plaintiff, Eric Friis, within 14 days as security for the costs of the adjournment. If the costs of the adjournment are H
> in excess of £10, the plaintiff, Eric Friis, to make up the difference. If less, the difference to be allowed to the plaintiff. If the said sum is not paid into court within 14 days, then action to be dismissed with costs and counterclaim dismissed without costs. The books and articles referred to in the counterclaim herein to be returned by the plaintiff to the defendants forthwith. Such return to be without prejudice to the plaintiff's rights.

It was explained to this court that the effect of the order was meant to be that, if the sum of £10 was not paid into court within 14 days, the action was to be dismissed and the counterclaim dismissed without costs, and that, if the security so paid in proved to be too much or too little to cover the costs of the adjournment, the matter should be adjusted in the final taxation.

The security was not paid, and the case therefore fell to be dismissed under the order. On Nov. 17, 1939, however, the defendants' solicitors applied to the court asking for an order to deal with outstanding costs. The order of Oct. 11, in our view, for reasons which appear hereafter, was a final determination of all matters, and left nothing to be reserved or worked out. Nevertheless, the court acceding, on Nov. 17, 1939, a further order was made as follows:

> Upon application being made at a court holden this day and upon hearing learned counsel for the plaintiff and the defendants it is ordered that (1) the costs of this action be allowed to the defendants on the High Court scale up to the date of remission and on Scale B thereafter, (2) the whole of the costs of the oral examination of the witness Leonard Ambrose senior taken on behalf of the defendant company be allowed, (3) the costs of application to have the case struck out because of non-compliance with the registrar's order of June 26 be allowed. (4) the costs of settling the defence by learned counsel be allowed, (5) the costs of this application to be the defendants, and to include a certificate for counsel, (6) costs not specifically dealt with to follow the event and to be costs in cause, (7) liberty to apply, (8) leave to appeal refused.

It is from this order that the plaintiff now appeals.

His case, which appears to us to be well-founded, is that the order of Oct. 11, 1939, constituted a final judgment between the parties, in the event which happened—namely, that the security there mentioned was not paid within 14 days, and that, it there being provided that in that event the action should be dismissed with costs and the counterclaim dismissed, there remained nothing to be done but for the registrar to tax the costs in accordance with the provisions of C.C.R., Ord. 47, and that the judge, having given final judgment, had no jurisdiction to make the further order which he purported to make on Nov. 17, 1939.

It is clear that the matters dealt with in cll. 2, 3, 4 and 6 of the order made on Nov. 17 are mere matters of taxation with which the judge had no concern unless they came before him on application to review. Clauses 5, 7 and 8 are merely incidental to an order which, in our opinion, the judge had no jurisdiction to make. This leaves only cl. 1, with which the argument of counsel for the respondents was mainly concerned, but, in our opinion, the order of Oct. 11 had already dealt fully and finally with this matter. Under that order, the registrar was bound to tax the costs in exactly the way which cl. 1 of the order directed. Our reasons for so holding can be stated quite shortly. Under the County Courts Act, 1934, s. 47, if a plaintiff brings an action in the High Court which could have been brought in the county court, he gets either no costs or only county court costs, according to the amount which he recovers, unless the judge makes a special order giving High Court costs. That section does not deal with the costs of a successful defendant, and there is no reason why it should. If the action fails, and the defendant is awarded costs, it follows that he gets High Court costs, and no special order is required for the taxation to be on that scale. He has been brought to the High Court, and so gets the costs applicable to the court in which he is sued. The object of the section is to discourage plaintiffs from proceeding in the High Court when they A can sue in the county court. It is not designed to penalise defendants who have not the choice of forum. If, then, an action is remitted to the county court, exactly the same considerations apply.

Under section 73, the county court is given a general power over the costs of remitted actions, so that it can deal not only with costs incurred B after, but also with those incurred before, remission, in so far as they have not already been dealt with in the order for transfer. It is provided, however, that the costs in the High Court are to be subject to the provisions of sect. 47, which, as we have already said, does not deal with the defendant's costs at all. The county court judge can, of C course, for good reasons, deprive a successful defendant of costs, and, were he to do so, that would apply to all costs, whether incurred before or after transfer. If he awards him costs, however, it must follow, in our opinion, that the defendant is entitled to all the costs to which he has been put—subject, of course, to taxation—by reason of the plaintiff's D bringing an action against him which has failed. The defendant, therefore, who is given judgment with costs in a remitted action is, without more, entitled to tax on the High Court scale down to the transfer, and on the appropriate scale thereafter.

It is unnecessary to decide whether or not, under the earlier words E of sect. 73, the county court judge can say that the defendant is only to have his costs before transfer on the county court scale. At present, however, we have not been able to visualise any case in which it would be right to make such an order, and we have great doubt if there is any power to do so. F

If a plaintiff gets only county court costs, a notional bill has to be taxed. For instance, he gets the costs of a plaint, and not those of a writ. Considering, however, that, except in special cases, such as Admiralty actions and workmen's compensation arbitrations, there is no such thing as entering an appearance in the county court, no notional G bill could be prepared on behalf of a defendant. Thus, if a defendant in a remitted action were only given costs of the High Court proceedings on the county court scale, he would, as it seems to us, be unable to recover the very first expense which he must incur in order to defend himself against what is, *ex hypothesi*, an unfounded claim. H

In our opinion, it is clear that an award of costs, without more, to a successful defendant in a remitted action gives him High Court costs down to the order of transfer, and county court costs thereafter. The order of Oct. 11 was, therefore, in all respects a final order. The application to the court on Nov. 17 was not only unnecessary, but was also one on which the judge had no jurisdiction to make any order, and it ought to have been dismissed with costs to the plaintiff. The judgment of the court, therefore, is that this appeal succeeds with costs.

Appeal allowed with costs.

Solicitors: *Morris & Son* (for the appellant); *Wedlake, Letts & Birds* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

TITMUS AND TITMUS *v.* ROSE AND WATTS.

[KING'S BENCH DIVISION (Wrottesley, J.), **November 10, 1939.**]

Master and Servant—Apprenticeship—Termination—Dissolution of partnership by retirement of one partner—Notice by retiring partner disclaiming any future liability—Apprentice continuing to work for remaining partner and receiving payment—Breach of contract of apprenticeship.

The infant plaintiff was apprenticed in 1935 to the two defendants who were trading in partnership. The covenants by the partners in the apprenticeship deed were joint covenants. On Oct. 18, 1938, the first defendant gave notice to the boy's father, to his other partners, and to all the apprentices in these terms: "I hereby as one of the partners of or in the firm or business known as the Atlas Engraving Co. give you notice that as from this date I have terminated my partnership therein and will not henceforth accept any liability or be answerable in any way for engagements of the said firm, business or company entered into after this date." After receipt of that notice, the boy continued to serve the firm, and for a period he was paid. After several months his pay was stopped, but he continued to serve, until finally, in May, 1939, he was told that he need not return on the following Monday, as a new company was being formed. On several occasions the boy's father, the adult plaintiff, was invited to keep the boy with the firm, and he finally consented to a transfer of his son's indentures to a new company to be formed, though he did not consent to an invitation that all wages owing should be considered in the change over and that the first defendant should no longer be responsible or have any connection with the new concern. The business became insolvent, and a receiving order was made, and the plaintiffs then brought an action for damages for breach of the indenture:—

HELD: (i) the mere fact that the boy continued at his work after receiving the first defendant's notice, being sometimes paid and sometimes not paid, did not establish an agreement by conduct by him, or by his father, or by both, that he or they were content to regard the first defendant as having ceased to have any obligations.

(ii) the defendants, by dissolving the partnership, had rendered themselves unable to carry out their covenant towards the infant plaintiff, and there was a breach of the contract contained in the deed of apprenticeship. The plaintiffs were, therefore, entitled to succeed.

[**EDITORIAL NOTE.** It is pointed out in the judgment herein that the difficulty which has here arisen has generally been avoided by making only one partner a party to the apprenticeship deed. If all partners are made parties to the deed and jointly enter into the covenants contained therein, then a dissolution of the partnership is a breach of the covenants, since the retiring partner has put himself in a position in which he will be unable to perform his duties under the deed.

AS TO EFFECT OF DISSOLUTION OF PARTNERSHIP ON APPRENTICESHIP DEEDS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 158, 159, para. 266; and FOR CASES, see DIGEST, Vol. 34, pp. 517, 518, Nos. 4339-4344.]

Cases referred to:

(1) *Lloyd* v. *Blackburn* (1842), 9 M. & W. 363; 34 Digest 517, *4340*; 11 L.J.Ex. 210.

(2) *Couchman* v. *Sillar* (1870), 22 L.T. 480; 34 Digest 517, *4342*.

(3) *Brook* v. *Dawson* (1869), 20 L.T. 611; 34 Digest 517, *4341*.

(4) *Brace* v. *Calder*, [1895] 2 Q.B. 253; 34 Digest 104, *776*; 64 L.J.Q.B. 582; 72 L.T. 829. A

Action for damages for breach of the contract contained in the infant plaintiff's indenture of apprenticeship. The facts are fully set out in the judgment.

N. K. Lindsay for the plaintiffs.

Maurice Share (for *O. Bertram*, on war service) for the defendants. B

Wrottesley, J.: In this case, the infant plaintiff became an apprentice in 1935 to Charles Watts and John Hamilton Rose, trading as the Atlas Engraving Co. The covenants, so far as those two persons are concerned, are joint covenants, and those two persons are described as C the masters in the covenants. They covenant to do various things, and, amongst other things, of course, they covenant, as usual, to teach and instruct the infant plaintiff, and to pay him certain rates of wages during the period of apprenticeship, which was to be five years. At the end of the apprenticeship, he was entitled to have this indenture handed back D to him, with a certificate that he had served his master properly indorsed upon it. Before that time came, two things happened. On Oct. 18, 1938, the first defendant gave notice to the boy's father, to his other partners and to all the apprentices in these terms: E

> I hereby as one of the partners of or in the firm or business known as the Atlas Engraving Co. give you notice that as from this date I have terminated my partnership therein and will not henceforth accept any liability or be answerable in any way for engagements of the said firm business or company entered into after this date.

That notice was signed by the first defendant, and underneath it there F appear these words:

> Communications to Mr. J. Bertram, Solicitor, 25, Old Buildings, Lincoln's Inn.

The only part of that notice which is or can be relied upon in this case is, of course, the first part, which says: G

> I hereby as one of the partners of or in the firm or business known as the Atlas Engraving Co. give you notice that as from this date I have terminated my partnership therein. . . .

After that notice, of which the boy's father and the boy took no particular notice, the boy went on serving the firm, and for a period of H time he was paid. Then, after a few months, his pay was stopped, but still he went on serving. Finally, in May, 1939, the boy was told not to come back on the following Monday, because a new company was being formed. It appears from the correspondence that more than once an invitation to keep the boy at work was extended to the boy's father, and ultimately the father was asked to authorise the transfer of the son's indentures to a new company which was going to be formed. There is no reason to doubt that, beyond the giving of that notice, dated Oct. 18, 1938, which I have already read, the first defendant in fact ceased to have anything to do with the business at all. In a A letter which was signed by Evelyn Dowling for the Atlas Engraving Co., in which the firm invited the father to transfer his son's indentures, this is said :

> It is understood that all wages owing will be considered in the change over and that John Arnold Hamilton Rose, my late partner, will no longer be responsible or B have any connection with the new concern.

That invitation was refused, on the advice of solicitors, and, I should imagine, quite rightly. I understand that the business has been shut down, and is now insolvent, and a receiving order has been made. The receiving order, according to the evidence in this case, states that the C partners are Miss Dowling and Mr. Rose. As the result of this, the infant plaintiff in this action, claims that his indenture has been broken by the first defendant. The father of the boy makes a similar allegation, and, therefore, they bring their action for damages.

First of all, there arises the question as to whether or not, in behaving D as he did, and thereafter taking no part in the business, the first defendant discharged himself from his liability under the deed which he had executed in Dec., 1935. What is relied upon by counsel for the first defendant is that, by going on and attending at the place of business after the receipt of that notice from the first defendant terminating his E connection with the firm, the infant plaintiff, or the infant plaintiff's father, or both, really by conduct consented to the agreement being discharged, and it is said, and authority has been cited to show it, that one can discharge a deed without having another deed. It is said that one can discharge a deed by a parol agreement. There is no doubt that F by the appropriate methods one can either vary or rescind a previous contract which was under seal. The courts of law follow the principles laid down in equity. It is no longer necessary, in order to bring that about, for either of the parties to go to the court of equity and get an injunction against a person trying to enforce an agreement under seal G on the ground that it has been varied or rescinded by another agreement not under seal. The courts of law now apply the same principles. I am perfectly satisfied that a parol agreement could have discharged this contract. I am also satisfied that the same thing can be done by conduct. In other words, it may be done by an implied agreement— H something which was not expressed in writing, but which was implied by the conduct of the parties. Therefore, conduct can, and might, I think, be used to support a claim that an agreement under seal has been discharged by some subsequent agreement. I think that there is no doubt that the conduct must be such that that is the only reasonable inference to draw from the conduct. Of course, if one has that position, then

I have no doubt that such conduct is the same as an agreement in
writing, or a satisfactorily proved oral agreement. I think that it is
sufficient to say that in this case what took place was very far from being
anything of the kind, and the mere fact that this boy went on attending
this work after receiving this notice from the first defendant, being
paid sometimes and not being paid at other times, is very far from what A
is necessary to establish an agreement by him or by his father, or by
both, that they were content that the first defendant was now to be
regarded as having ceased to have any obligations.

Some time prior to the first defendant's leaving the firm, it came to the
knowledge of the boy, and, I have no doubt to the knowledge of his B
father, that the money which was being put into this business was not
being found by the first defendant. Can it be said that there was a breach
here, inasmuch as all that took place was that the first defendant
determined the agreement between himself and his partner or partners?
This question has been discussed from time to time in the courts of C
law in reference to apprenticeships. In that connection, cases were
cited to me under that head, such as *Lloyd* v. *Blackburn* (1), *Couchman* v.
Sillar (2) and *Brook* v. *Dawson* (3). They are all cases where there
was discussed the question as to what happened when an apprentice
was bound, not to one master, but to two masters jointly. D

The difficulties created by those decisions were generally avoided
by binding people, not to a partnership, but to one of the partners.
That is pointed out by Mellor, J., in *Brook* v. *Dawson* (3). From
one point of view, it may seem to be rather extraordinary that, if
partners took an apprentice, they thereby warranted that they would E
not dissolve the partnership until the apprenticeship had been completed,
but certainly not one of those cases is an authority to the contrary,
and *Couchman* v. *Sillar* (2) certainly points out that, if partners choose
to take an apprentice jointly, they must not put themselves in the
wrong by preventing themselves from carrying out that indenture by F
dissolving the partnership. However that may be, it seems to me that
this case is really covered by *Brace* v. *Calder* (4), a case, not of apprenticeship,
but of master and servant. Lopes and Rigby, L.JJ., the majority
of the court in that case, which they described as a case of some difficulty,
came to the conclusion that, if the partnership of four members agreed G
to employ a servant for two years, and, before the two years had
expired, dissolved partnership, they were guilty either of a wrongful
dismissal of that servant or at least of a failure to carry out their contract
to employ that servant for two years. The court pointed out that, if
in fact the surviving partners continued to employ the servant, H
there was nothing wrong. I observe that in that case the court took
a certain view, and the plaintiff was awarded no costs, either in the
Court of Appeal or in the court below. I think that without doubt
technically the position is that by dissolving partnership these two
defendants here rendered themselves unable to carry out their covenant

towards the infant plaintiff, and, that being so, the plaintiffs are entitled to succeed.

I must now go into the question of damages. First of all, with regard to wages, the infant plaintiff is entitled to the agreed rate of wages which were not paid, and that is the sum of £30 11s. Now comes the
A further point that the plaintiff has received considerably less in wages than he would have received had he received the wages under his indentures. Further, it is said that the loss at the same rate, comparing the partnership rate of wages with what he would have received had the indentures continued in force, and had effect been given to them, was
B £30 11*s*., and that is the maximum, I think, for which he can possibly ask in regard to this matter. I do not know whether or not it is suggested that he has not had proper tuition. However, I do not think that there is anything in that.

The other side of the question is this. In fact, I am, of course, entitled
C to take judicial notice of the fact that a war has supervened, and would have supervened whatever happened to the indentures. That is a matter which I have to consider. It might have a very remarkable effect on the question whether or not it was desirable for any person to continue in a trade of this kind. On the other hand, there is also the fact
D that the boy has got into a trade which is probably not a bad trade for a boy of his age to be in at a moment like this. Taking everything into consideration, I think that it will be sufficient if, in addition to the loss of wages down to May, which I have given as £30 11*s*., I award this boy, in respect of these other heads, the sum of £70. As regards the second
E plaintiff, I think that he is entitled to some nominal damages, and I award him the sum of £5.

Judgment for the first plaintiff for £100 11*s. and for the second plaintiff for* £5 *with costs.*

F Solicitors: *Alfred Slater & Co.* (for the plaintiffs); *Julius Bertram* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

G BROOME AND ANOTHER *v.* PARDESS CO-OPERATIVE SOCIETY OF ORANGE GROWERS (EST. 1900), LTD.

[COURT OF APPEAL (MacKinnon and Clauson, L.JJ., Charles, J.), **February 20, 21, 22, 1940.**]

H *Contract—Implied terms—Business efficacy—Broker's contract—Sale of fruit by agent—Advance to grower by agent—Shipment unsound on arrival and unsaleable in market—Implied term that fruit on arrival to be of merchantable quality.*

The plaintiffs, a firm of London fruit brokers, entered into a contract with the defendants, who were producers of oranges in Palestine, to sell the defendants' oranges in London on the terms that in any event they should advance to the defendants 7*s*. 6*d*. per case, and that on a sale their charges should be 6*d*. plus 7½ per cent. gross per case, all surplus on sale above 7*s.* 6*d.* per case to be remitted to the defendants, subject to the right of the plaintiffs to retain their commission and expenses. During the growing season covered by the contract the weather had been abnormally wet, with the result that the oranges, though apparently shipped in good condition, were, on arrival in London, to a large extent unsaleable, and such as were saleable required repacking. The plaintiffs were consequently unable to sell the oranges in the market, and being bound to pay the defendants the guaranteed advance, suffered a considerable loss. They thereupon brought this action for damages, and contended that there was an implied term in the contract that the goods would be of merchantable quality, so that they could be sold in the ordinary course of business. The defendants contended that the contract was complete in itself, and that no term could be implied to give business efficacy to it :—

HELD : (i) the court will not imply a term in a written contract unless such term is a necessary implication to give efficacy to the contract and it can be said that both parties, if asked at the time the contract was entered into, would have said that the term sought to be implied was a term of the contract.

(ii) the plaintiffs had failed to establish that there was any such implied term in the present case. In fact, the contract expressly provided for this contingency.

Judgment of HILBERY, J. ([1939] 3 All E.R. 978) *reversed.*

[**EDITORIAL NOTE.** The contract here is not one of sale and purchase and is therefore not within the Sale of Goods Act, 1893. The contract was one between a grower and shipper in Palestine and a broker on the London market, and the question is not whether all the conditions and warranties of the Sale of Goods Act, 1893, should be implied into such a contract, but simply whether, in this particular contract, there should be implied a term that the goods should reach London in a merchantable state.

AS TO BROKERS' CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 38-42, paras. 42-48 ; and FOR CASES, see DIGEST, Vol. 12, pp. 610-612, Nos. 5044-5058.]

Cases referred to :

(1) *Atkinson* v. *Ritchie* (1809), 10 East, 530 ; 41 Digest 464, *2955.*

(2) *Paradine* v. *Jane* (1647), Aleyn, 26 ; 12 Digest 371, *3088.*

(3) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, *3093* ; 32 L.J.Q.B. 164 ; 8 L.T. 356.

(4) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488 ; 12 Digest 610, *5042* ; 60 L.J.Q.B. 734 ; 65 L.T. 286.

(5) *Lazarus* v. *Cairn Line of Steamships, Ltd.* (1912), 106 L.T. 378 ; 12 Digest 611, *5051.*

(6) *Reigate* v. *Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592 ; 12 Digest 611, *5052* ; 87 L.J.K.B. 724 ; 118 L.T. 479.

(7) *Beer* v. *Walker* (1877), 46 L.J.Q.B. 677 ; 39 Digest 442, *714* ; 37 L.T. 278.

APPEAL by the defendants from a judgment of HILBERY, J., dated July 21, 1939, and reported [1939] 3 All E.R. 978. The facts are fully set out in the judgment of MACKINNON, L.J.

J. W. Morris, K.C., and *H. C. Leon* for the appellants.

A. T. Miller, K.C., and *Neville Faulks* for the respondents.

Morris, K.C. : The implication for which the respondents contend is not one which can arise in law. It is not an implication which the parties can have intended. The question of repacking was dealt with in the contract. The respondents, however, want to say that it is an implied term that there should be a limit to the amount of repacking.

The contract expressly provides for repacking on the basis that there will be some wastage. It is not enough for the respondents to say that the term they think should be read into the contract is a reasonable one. One cannot tell if an orange is waterlogged, and so will not remain in good condition for the usual length of time. [Counsel was stopped A by the court.]

Miller, K.C.: This is necessarily a case in which the contract must be interpreted by reading into it the meaning of the parties. There are four ways in which business is done at Covent Garden. One is a method whereby the shipper arranges with the broker that the broker shall buy B the goods outright. In the absence of any agreement, the Sale of Goods Act, 1893, s. 14 (2), would apply to the contract, and it would be an implied term that the goods should be of merchantable quality. By the second method, the goods are consigned to a broker to be sold on the shipper's behalf, and the shipper has to take the risk of the goods C not being merchantable on their arrival in London. Under the third method, the shipper receives an advance from the broker. It is called an accommodation advance. The shipper, however, takes the risk of the market, and also of the condition of the goods on their arrival in London. In each of these three cases, it is the grower, or shipper, who D takes the risk. The fourth method is the one which has been employed in the present case. The broker has made the shipper a guaranteed advance. The shipper is entitled to retain this advance, provided he fulfils all his obligations, and he is under an obligation to send goods of merchantable quality. The broker has entered into a bargain by E which he takes the risk of the market, but he has done so upon the assumption that he will receive merchantable goods. Both parties were contemplating the provision of merchantable goods. Something must be implied as regards freight and duty, and something must be implied as to the shipper's obligation to send saleable goods. The clause F which provides for repacking applies to normal consignments only. Unless the market went against the broker, the charge would be borne by the shipper. The parties provided for normal wastage only, and not for an abnormal and unusual wastage, due to a breach of the shipper's obligation to send merchantable goods. [Counsel referred to *Beer* v. G *Walker* (7).]

MACKINNON, L.J.: In this case, the plaintiffs sue the defendants for damages for breach of contract. The defendants are a co-operative society who collect from their members in Palestine oranges grown by H those members, and put them on the market in England. The plaintiffs, originally a firm, but later a company, carry on business at Covent Garden as commission agents. The plaintiffs, as commission agents for the defendants' goods, had had business relations with them for some years before the particular occasion of this dispute arose.

The oranges are packed in Palestine by the shippers, who are the defendants. The defendants had three grades or brands—namely, (i) the Pardess brand, which was the best, (ii) the Ophir brand, which was the second quality, and (iii) the Tabor brand, which was the third quality. This particular case concerns oranges of the second quality, the Ophir brand.

By the Fruit Export Ordinance, 1927, the government of Palestine established a system of inspection of citrus fruit by government officials A in Palestine under which a percentage—no doubt a sufficient percentage, in the judgment of the inspectors—is opened and examined in Palestine, and every shipment has attached to it, or accompanying it, a certificate issued by the Fruit Inspection Service of the government of Palestine, which certifies that : B

> The undernoted consignment [all the particulars of it being then given] has been inspected and passed as fit for export.

The plaintiffs, as I have said, arranged, as agents on behalf of the defendants, to market this fruit in Covent Garden. That can be done by persons in the position of the plaintiffs in one out of four different C types of transactions—namely, (i) sale and purchase, (ii) free consignment, (iii) what is called the accommodation advance system, and (iv) what is known as the guaranteed advance system. I need not trouble about the first two. We are only concerned here with the third and fourth systems. D

In previous years, in the season 1933-34 and the season 1934-35, the plaintiffs had received oranges from the defendants under the accommodation advance system. Under that system, when goods are shipped, the shippers, the defendants, draw on the plaintiffs' agents for a certain agreed amount per case, and are to that extent paid in advance for E what will ultimately be realised in London. Under that arrangement, the plaintiffs are entitled to an agreed commission and a certain amount for expenses. They receive the goods in London, put them on the market at Covent Garden, and sell them at the best price they can realise. Having done so, they render an account to the defendants. F They credit them with the full amount realised by the sales ; they deduct the expenses they have paid—the freight and the agreed expenses—and they deduct their agreed commission. If the resulting net figure is more than the amount advanced to the defendants by way of the accommodation advance, the plaintiffs will account to the defendants for that G difference. If, on the other hand, the sales have not been at sufficiently good prices to realise the amount of the accommodation advance, plus the expenses and the plaintiffs' commission, there will be, of course, a deficiency between the net realised prices and the amount which has already been put into the pockets of the defendants upon the accom- H modation advance. Under that system, it being only an accommodation advance, the defendants have to return to the plaintiffs the deficiency, whatever it is. That system of accommodation advance was one which had been employed between the plaintiffs and the defendants in the seasons 1933-34, 1934-35 and 1935-36. Obviously, under that system, the risk of the sales in London not being sufficient to satisfy the advance, the plaintiffs' commission, the expenses, the freight, and that sort of thing, is upon the defendants. That is to say, the risk of any deficiency is upon the defendants.

In the season 1936-37, at the suggestion of the plaintiffs, the parties departed from that system, and adopted what I referred to just now as the fourth system—namely, the guaranteed advance. The representative of the plaintiffs foresaw that, owing to political difficulties in Spain, the supply of oranges to the London market would be very short. He therefore expected a brisk demand for these Palestine oranges, and he thought that, as a matter of business bargaining, he was in a position to offer to the defendants more attractive terms than those which they had previously enjoyed under this accommodation advance system. He therefore proposed to them that in this year he should receive and market their fruit under the system of guaranteed advance. The essential difference between the accommodation advance and the guaranteed advance was that as an accommodation advance the plaintiffs advanced a certain amount per case to the defendants upon shipment. In this case, it was an amount of 7*s.* 6*d.* per case. There was the usual provision for expenses and commission payable to the plaintiffs. The plaintiffs would then market the goods, and, having done so, they would render an account to the defendants, as they had done in previous years. However, there would be this essential difference between the account rendered in this year and in previous years. If the total realisation, less commission and expenses, was less than the guaranteed advance, the plaintiffs would not be entitled to call upon the defendants to make good that deficiency. It was a guaranteed advance, and the plaintiffs agreed to take, and took, the risk of any failure upon their part, in selling the goods in London, to realise the full amount of their guaranteed advance. That was the system which, at the instance of the representative of the plaintiffs, the parties adopted in the season of 1936-37.

The arrangement was made by a letter addressed by the defendants to the plaintiffs, accepted in identical terms by the letter in reply by the plaintiffs, dated Oct. 10, 1936. It is addressed by the defendants to the plaintiffs:

> We take pleasure in confirming the conversation that our Mr. Salem had with you yesterday when it was agreed to supply you, during the season 1936-37, 40,000 cases of Ophir oranges at the following terms: quantity 40,000 cases of oranges Ophir brand, approximate basis of shipment being 30 per cent. November to December, and 70 per cent. January to March. Price: guaranteed advance of 7*s.* 6*d.* f.o.b. Palestine ports for the entire season. All surpluses over and above this price will be remitted by you to our head office in Tel-Aviv.

It did not mention, but it is obvious, that, if they realised more than 7*s.* 6*d.* per case, including their commission and expenses, any surplus over the guaranteed advance had to be accounted for by the plaintiffs to the defendants. That is what that passage I have just read refers to:

> All surpluses over and above this price will be remitted by you to our head office in Tel-Aviv.

However, there are omitted (as would have been included under the old system of accommodation advance) the words: "Any deficiency over and above this price will be remitted by us to you." That omission was due to the essential difference between this guaranteed advance and the former system of accommodation advance. Then the third paragraph about specification is immaterial. It stipulates the sizes of the oranges, and the numbers to be packed in each case. Then the fourth paragraph is as follows:

> Charges: 6*d.* and 7½ per cent. net per case.

That was a mistake. It is agreed by both sides that it was an error to put in the word "net." Either it should have been omitted or the word should have been "gross." Both sides agree that it should be "Charges: 6*d.* and 7½ per cent. gross per case." Then:

> These charges will also cover the repacking expenses as and when incurred by you. We trust that you will be able to obtain for us satisfactory prices and await your confirmation of the above arrangements.

The plaintiffs confirmed the arrangement. A very important passage in this contract is the sentence under the heading "Charges":

> These charges [the 6*d.* per case and 7½ per cent. gross on the proceeds] will also cover the repacking expenses, as and when incurred by you.

That was put in for this reason. Though the oranges are picked and packed, to the best of the ability of the shippers in Palestine, in good and perfect condition, it is well-known that, during the voyage from Palestine to England, a certain number of them go bad. The cases have to be examined on their arrival, either at the docks, or more commonly at Covent Garden, when they are opened and the bad oranges are taken out. A certain number of cases are re-arranged in order to fill up the spaces caused by taking out the bad oranges, so as to get the contents of the case into good condition again. That was an incident of this business. The parties knew it perfectly well, because the necessity for that sort of repacking had occurred in previous seasons to a greater or less extent. During the season 1934-35, the amount of that wastage by oranges going bad had been as much as a total of 11·96 per cent. of the oranges sent. That wastage was in two categories. Some were so bad that they had to be what is called shot as useless, and some had to be sold, not as good oranges, but as wet and wasted. In the 1934-35 season the total quantity involved under both those heads was 11·96 per cent. of the oranges dispatched. In the season 1935-36, the total amount was 2·9 per cent.

The parties having made that contract, the defendants began to make shipments in accordance with it. During the early part of the season, oranges arrived in a fairly good, normal condition, but unfortunately in January, very disastrously, an excessive amount of bad oranges were found on arrival of the shipments at the docks, or at Covent Garden. That apparently was due to some curious freak of nature in Palestine. There was nothing in the appearance of the oranges which could warn the shippers or the government inspectors that the oranges would not carry in the normal way in which those shipments had been carrying in the past. Owing to some excessive rainfall, and consequent drinking up of water out of the ground by the orange trees, it is said that the oranges A got into a condition which is popularly known as waterlogged, and they had inherent in them to an excessive degree an unfortunate and disastrous tendency to go bad. During the latter part of this season, a very large amount of them went bad. When I say a very large amount, the total, which had been 11·96 per cent. in the 1934-35 season, went B up to as much as about 40 per cent. during this season in question.

The plaintiffs did their best with the oranges. They sold those that were good at the best prices they could get, but they had to sell a large quantity of the oranges as wet and wasted, and an unhappily large quantity had to be shot as useless. The result of this season was that C the total amount realised on selling the oranges left a very considerable deficiency against the guaranteed advance of 7*s*. 6*d*. per case which they had made to the defendants. Clearly, on the express terms of the contract, the plaintiffs had no right to claim from the defendants that the defendants should make good that deficiency. They had agreed to D the guaranteed advance. They had promised that any surpluses over that guaranteed advance would be remitted to the defendants. They had not, however, stipulated in their contract that any deficiency on the guaranteed advance should be paid back to them by the defendants.

The present claim is put forward by the plaintiffs, claiming that the E defendants are liable to make good that deficiency. It is manifest, as I say, that, on the express terms of the contract entered into by them, there is no clause of the contract under which they can make any such claim. They therefore seek to assert—and before the judge who tried the case they have succeeded in asserting—that there was an implied F term of this contract, that that implied term was broken by the defendants, and that, therefore, they are entitled to claim this deficiency on the guaranteed advance from the defendants as damages for breach of the conditions of that implied term in the contract.

The whole question, therefore, is whether, as a matter of law, the G plaintiffs can establish that this suggested term ought to be implied. One fairly obvious and considerable difficulty for the plaintiffs was the difficulty of formulating the wording of that implied term in their pleadings. They made two attempts at it. First of all, in their original pleadings, they pleaded in para. 2 as follows:

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> It was a condition of the said agreement to be implied in law that the said oranges should be delivered to the plaintiff firm in a sound and merchantable condition, equal in quality to those delivered in previous seasons, and fit to be re-sold by them as aforesaid and in such condition as to enable them to obtain repayment of the said sum of £15,000 [the guaranteed advance] and further alternatively that each of the cases supplied should contain only oranges of such nature and quality and in such condition on shipment as to be capable of and suitable for carriage to London in the manner customary in the trade and of sale thereafter,

> such carriage as cases of oranges in good merchantable condition, alternatively of Ophir oranges in good merchantable condition.

That was the original implied term which was relied upon and suggested by the plaintiffs. At a late stage of the proceedings, however, apparently during the actual hearing of the case, the claim was amended. The passage I read was deleted, and the following claim was substituted as an even longer implied term :

> It was a further term of the said agreement to be implied from the subject-matter and all the circumstances that the plaintiff firm should pay for and on behalf of the defendants (if the defendants did not do so) the freight and duty upon such consignments of oranges and should deduct the sums so expended by them from the amounts so realised as aforesaid and further it was a condition of the said agreement to be implied in law that the said oranges should be delivered to the plaintiff firm in London in a sound and merchantable condition, save as to not more than 5 per cent. of the total shipments and fit to be re-sold by them as Ophir oranges in good merchantable condition ; and further or alternatively, that the cases supplied should contain only oranges of such nature and quality and in such condition on shipment as to be capable of and suited for carriage to London in a manner customary in the trade and of sale thereafter, such carriage, save as to not more than 5 per cent. of the total shipments as cases of oranges in good merchantable condition, alternatively of Ophir oranges in good merchantable condition.

That concession in the variation of the alleged implied term, and the insertion of a limitation of not more than 5 per cent., were no doubt brought about because it is quite plain that the contract between the parties expressly contemplates that there may be some oranges that will go bad, because it is expressly provided that the charges to be made by the plaintiffs will cover the repacking expenses, as and when incurred by the plaintiffs. Those repacking expenses arose, and were known to arise, because some of the oranges might not arrive in good condition.

The plaintiffs, somewhat arbitrarily, have said that in any case not more than 5 per cent. ought to be bad, though, as I have pointed out, in the 1934-35 season, when there were dealings with similar goods—though not under the guaranteed advance, but under the accommodation advance, when the matter did not affect the ultimate profit of the plaintiffs—the amount of bad oranges had been as high as 11·96 per cent.

The fact remains, however, that the plaintiffs, in one form or another, are asking to import an implied term into this contract in regard to a matter as to which there is an express provision in the contract—namely, what is to happen in regard to oranges which turn out to be bad on arrival. It is an express provision that the plaintiffs are to pay the resulting expenses of repacking arising from those bad oranges, and they are to pay those expenses out of their allowance of 6*d*. per case and 7½ per cent. commission.

I should have added, perhaps, that the judge eventually formulated the implied condition in these terms, at p. 988 :

> . . . it appears to me that what the parties would have to read into the contract if they had been asked about it, would be that they should supply during the season 40,000 cases of oranges Ophir brand f.o.b. Palestine in such a condition as to be saleable as Ophir brand oranges on the London market of merchantable quality save for the usual 5 per cent. lost in repacking.

The whole question in this case is whether or not the plaintiffs can establish that there was this implied term in this contract. In earlier and simpler times, the answer which would have been given by Lord Ellenborough, C.J., to such a contention would have been immediate and emphatic. In a classic utterance in *Atkinson* v. *Ritchie* (1), Lord Ellenborough, C.J., says, at pp. 533, 534, that the rights and duties of the parties to a contract:

> . . . are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine* v. *Jane* (2) [p. 27] has been often recognised in courts of law, as a sound one; i.e., that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

If before Lord Ellenborough, C.J., the plaintiffs had put forward this claim that the defendants were bound to make good to them the deficiency realised by the sale less their guaranteed advance of 7*s.* 6*d.* f.o.b., Lord Ellenborough, C.J., would have said: "You have not provided for this by your contract. You might have done so. As you have not provided for it by your contract, you cannot rely upon any implied term. The terms of your actual contract bind you, and fix your liability." It is quite true, of course, that that rigorous principle so laid down by Lord Ellenborough, C.J., has been very largely departed from. I do not know whether or not it is so historically, but I should think that it is very likely that one of the first occasions on which the rule of Lord Ellenborough, C.J., that no exception can be engrafted upon a contract by implication was not expressly recognised was in 1863, in *Taylor* v. *Caldwell* (3), where Blackburn, J., stated what is, in my opinion, the true principle—namely, that no court has an absolving power, but it can infer, from the nature of the contract and the surrounding circumstances, that a condition which is not expressed was the foundation on which the parties contracted.

The question is whether the plaintiffs here can establish that this suggested condition, clearly not expressed, was one upon which the parties both clearly contracted. There are several passages in which the courts have been warned as to the care with which they must examine any claim to insert into a contract an implied condition. For instance, in *Hamlyn & Co.* v. *Wood & Co.* (4), Lord Esher, M.R., says, at p. 491:

> I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, [any such implied stipulation] unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

There are two passages in which Scrutton, L.J., repeats that warning in language which it is useful to cite here. First, in *Lazarus* v. *Cairn Line of Steamships, Ltd.* (5), he said, at p. 380:

> I was referred by each side to a number of cases in which, in somewhat similar

> states of fact, contracts had or had not been implied, and defendants had or had not been held liable. I respectfully sympathise with the protests of LORD ESHER, M.R., and BOWEN, L.J. in *Hamlyn & Co.* v. *Wood & Co.* (4) against being compelled to examine numerous cases on other contracts. . . I have carefully considered the numerous cases cited to me to see what assistance I can get from them. I read them as deciding (1) that the first thing to consider is the express words the parties have used; (2) that a term they have not expressed is not to be implied because the court thinks it is a reasonable term, but only if the court thinks it is necessarily implied in the nature of the contract the parties have made. . .

In a passage which is usually cited from *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (6), SCRUTTON, L.J., said, at p. 605:

> These principles, however, have been clearly established: The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course so and so will happen; we did not trouble to say that; it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

I will add only one observation to those passages. Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject-matter, as to which there is an express provision, that there is also an implied provision or condition in the contract.

Examining this case in the light of those principles, though it might be said from the point of view of the plaintiffs that the provision which has been found to be implied by the judge might have been reasonable, I am entirely unable to satisfy myself that it was a necessary provision. Taking the test as SCRUTTON, L.J., applies it, and supposing that, when this contract was being negotiated, a more imaginative friend had said to the plaintiffs, "You are giving them a rather favourable contract this year with the guaranteed advance of 7*s.* 6*d.* What is to happen if there is a very large amount of bad oranges? You know there were 11·96 per cent. of bad oranges two years ago. There might be even more," I am quite unable to come to the conclusion that the plaintiffs and defendants would both have said: "Of course, if there are more than 5 per cent. of bad oranges, it will have to be made good." The defendants, I am satisfied, would have said: "Nevertheless, the whole basis of this contract is that you are to run the risk of the cost of repacking bad oranges. We have provided for that in the contract." It may be that the result of the imaginative friend's interposition would have been to make the plaintiffs aware that they were running a risk of which they had not formerly been aware. It may be that their eagerness to get the supply of Palestine oranges, for which they thought there would be a tremendous demand owing to Spanish troubles, would have been discounted by the thought that possibly there might be a disastrous number of bad oranges, and that, perhaps, this was not so prudent a contract as they had first thought. It may be that the result of what I have called the imaginative third party's intervention would have been that the parties would have discussed the matter further, and no contract would have been entered into at all, because, for all I know, if the plaintiffs had said, "We must have this 5 per cent. clause," the defendants might have said. "No. We will not do that. There is a great demand this year for Palestine oranges. If you are not prepared to give the guaranteed advance of 7*s.* 6*d.*, and then run the risk of repacking such bad oranges as there are, there are other of your competitors in the market who will give us those terms, and we can go to them, instead of coming to you."

I need not discuss the matter more in detail. I am quite unable to be satisfied that, if this point had, in the words of Scrutton, L.J., been suggested to the parties, when they were making this bargain, by a more imaginative third party, as a necessary result they would both have agreed that this implied term about more than 5 per cent. of bad oranges would have been inserted expressly in the contract. The result is that I think the plaintiffs fail to establish that there is any such implied term, with the consequence that there has been no breach of contract by the defendants, and the judgment for the plaintiffs for damages for breach of a supposed implied term by the defendants cannot stand. This appeal must be allowed with costs.

Clauson, L.J.: I agree, and I have nothing to add.

Charles, J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellants); *Tanner & Worley* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

GOODBARNE *v.* BUCK AND ANOTHER.

[Court of Appeal (MacKinnon and Clauson, L.JJ., Charles, J.), **February 22, 23, 1940.**]

Insurance—Motor insurance—Third-party risks—Policy issued upon proposal form containing false statements—Policy subsequently avoided by court—"Cause or permit" an uninsured car to be driven—Road Traffic Act, 1930 (*c.* 43), *s.* 35 (1).

The defendant W. E. B., with the knowledge of the defendant H. A. B., signed a proposal form for a policy to satisfy the Road Traffic Act, 1930, in the name of the defendant H. A. B. as proposer and registered owner of the van, the vehicle to be driven by W. E. B. The purchase price of the van had been lent to W. E. B. by H. A. B., but thereafter H. A. B. had no concern with the user of the van, which was employed by W. E. B. in his business. On Aug. 26, 1938, the plaintiff's husband was fatally injured by the negligent driving of the van by W. E. B. On May 12, 1939, at the suit of the insurance company, the policy was avoided by reason of misrepresentation in the proposal form. An action was subsequently brought against W. E. B., whose negligence was not denied,

and against H. A. B., on the ground that, by reason of the circumstances in which H. A. B. assisted or permitted W. E. B. to obtain an insurance which turned out to be valueless, H. A. B. had caused or permitted W. E. B. to use the van in breach of the Road Traffic Act, 1930, s. 35 (1):—

Held: in the circumstances, H. A. B. had not caused or permitted the user of the van by W. E. B.

Decision of* Hilbery, J. ([1939] 4 All E.R. 107) *affirmed.

[**EDITORIAL NOTE.** The appellant, having obtained a barren judgment against one defendant in a running-down action, and the third-party policy of insurance having previously been declared void on the application of the insurance company, sought to establish liability against the respondent, on the principle in *Monk* v. *Warbey* (1), on the ground that he had caused or permitted the user by a third person of an uninsured vehicle. It was held, however, that, as the respondent was not the owner of the vehicle, he could not have so caused or permitted its user. This case emphasises the fact that, contrary to general belief, not every driver of a vehicle involved in an accident is necessarily covered by insurance in respect of third-party liability.

As to Duty to Insure, see HALSBURY, Hailsham Edn., Vol. 18, pp. 561-563, paras. 908-912; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217r-3217ee.]

Cases referred to:

(1) *Monk* v. *Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153: 152 L.T. 194.

(2) *Watkins* v. *O'Shaughnessy*, [1939] 1 All E.R. 385; Digest Supp.

(3) *Richards* v. *Port of Manchester Insurance Co., Ltd.* (1934), 152 L.T. 261; Digest Supp.; *affd.*, 152 L.T. 413.

(4) *Daniels* v. *Vaux*, [1938] 2 K.B. 203; [1938] 2 All E.R. 271; Digest Supp.; 107 L.J.K.B. 494; 159 L.T. 459.

Appeal by the plaintiff from a judgment of Hilbery, J., dated Oct. 9, 1939, so far as the decision related to H. A. Buck, and reported [1939] 4 All E.R. 107. The facts are fully set out in the judgment of MacKinnon, L.J. The appellant asked that judgment be given against H. A. Buck for the same amount as the judgment of Hilbery, J., against W. E. Buck, and that it should be in addition thereto.

Donald McIntyre for the appellant.

The respondent, H. A. Buck, appeared in person.

McIntyre: It was decided by Hilbery, J., that, where there is a policy of insurance in existence at the time of the accident, but the insurers obtain a declaration that at all material times they were entitled to avoid the policy, there is at the time of the accident a policy of insurance in force in relation to the user of the vehicle. The judge arrived at that conclusion because he felt that, at the time of the accident, there was in force a voidable, as distinct from a void, policy. That is the point which I wish to challenge. The insurers were never at risk in this matter, because there never was a contract. The proposal form was signed, not by H. A. Buck, but by W. E. Buck, who signed it in his brother's name. H. A. Buck, however, was aware of the fact, and lent his name and his credit to the scheme. There is evidence of causing and permitting the car to be used in contravention of the provisions of the Road Traffic Act, 1930, s. 35. The decision in *Monk* v. *Warbey* (1) is not limited to the case of an owner. Moreover, it is not necessary for *Monk* v. *Warbey* (1) to apply to show that the tortfeasor knew that the vehicle was being driven uninsured. There was not, at the time of the accident, a valid policy of insurance as regards this particular vehicle. Either H. A. Buck was the owner of the vehicle or he was sufficiently identified with it, in that he caused or permitted it to be upon the road. H. A. Buck assisted W. E. Buck to procure a policy which was valueless. [Counsel referred to *Watkins* v. *O'Shaughnessy* (2), *Richards* v. *Port of Manchester Insurance Co., Ltd.* (3) and *Daniels* v. *Vaux* (4).]

The respondent was not called upon.

MacKinnon, L.J.: This is a very hard case, and one in which I should have been glad if we could have assented to the very careful and very able argument of counsel for the appellant. The action was brought by the widow of a man who was knocked down, and so badly injured that he died, by a Ford van, BXD 883, which was being driven by one William Edward Buck. The action was brought both against William Edward Buck and against H. A. Buck, his brother. There was no question that the accident was due to the negligent driving of William Edward Buck, and the judge gave damages amounting to a sum of £2,500 against him. William Edward Buck, however, was utterly impecunious. What was still more disastrous was that, at the time when he was recklessly driving this van, he had not an effective policy of insurance covering him against third-party risks. He had procured a policy by putting forward a proposal to the Zurich General Accident Insurance Co., but in earlier proceedings the Zurich company had brought an action against William Edward Buck and Henry Albert Buck claiming that it had a right to avoid that policy. That action was tried by Branson, J., who came to the conclusion—and he had no option but to come to the conclusion—that the insurance company had made out that the whole business in connection with the proposal was utterly fraudulent, and he set aside that policy. The result was that, when the accident happened, there was no effective policy of insurance, and the plaintiff, who had sustained damage assessed at over £2,000, had the prospect of having no one to answer her claim against William Edward Buck.

In those circumstances, not unnaturally, she sought to find somebody else with sufficient money to pay, at least, a part of these damages. She sought to find that person in H. A. Buck, the brother of the driver of the van. Her claim against H. A. Buck is based upon the principle laid down in *Monk* v. *Warbey* (1)—namely, that, where there has been a breach by the owner of a motor car of the provisions of the Road Traffic Act, 1930, s. 35 (1), not only is the person committing a breach of that section liable in the criminal courts to the penalty provided by that section, but he is also liable in damages civilly to a third person who has been injured as a result of his negligence.

The Road Traffic Act, 1930, s. 35, provides as follows:

> (1) Subject to the provisions of this part of this Act, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirement of this part of this Act. (2) If a person acts in contravention of this section, he shall be liable to a fine not exceeding £50 . . .

The claim here made is that, though the van had been driven by W. E. Buck, H. A. Buck, his brother, was liable to a prosecution under sect. 35 as having caused or permitted W. E. Buck to use this van on the road without there being in force any effective policy of insurance. It is said that H. A. Buck could have been successfully prosecuted and fined £50 under that section, and, therefore, it follows, under the principle of *Monk* v. *Warbey* (1), that he is also liable to pay the damages sustained by the plaintiff.

The whole question is whether or not H. A. Buck could have been successfully prosecuted under this section. The offence is "to cause or permit any other person to use." There are two different verbs. The second one, "permit," I think, is much easier to construe and to interpret than the first one, "cause." In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle. As at present advised, I can see no ground on which anybody can be in a position to forbid another person to use a motor vehicle except in a case where the person charged is the owner of the car. If one is the owner of a car or of a van, one can forbid or one can permit another to use it. It was no doubt for that reason that considerable effort was made to establish that in this case H. A. Buck was really the owner of this car. It was in truth registered with the London County Council in his name. It appears on investigation, however, that the truth of the matter is that W. E. Buck, being impecunious, and having a judgment against him for some other car which he had had under a hire-purchase agreement, in respect of which he could not continue the payment of the instalments, wanted to get the use of a car in his business of a greengrocer in such circumstances that it would not be liable to be taken in execution by his creditors. He therefore got this brother of his, H. A. Buck, by a wholly discreditable manœuvre, to lend him a sum of £20, with which he, W. E. Buck, could buy this second-hand Ford van. The only connection between H. A. Buck and the van which might show the ownership of the van was that H. A. Buck had lent his brother £20 in order that the brother should buy this van. The brother did buy the van, and registered it in the name of H. A. Buck. The truth was, however, that it never was H. A. Buck's van. It was at all times the property of W. E. Buck. That being so, the attempt to

make H. A. Buck liable under that limb of the section which makes it
an offence to permit any other person to use a motor vehicle on the road
without a proper insurance policy fails *in limine*, because it is not established
that there was any right in H. A. Buck to forbid W. E. Buck to
use the car. He could have that right to forbid him to use it only if
A he were the owner of the car, and he was not.

There remains the question whether or not it could be charged against
H. A. Buck that he caused W. E. Buck to use the motor vehicle on a
road. What happened with regard to that was that H. A. Buck, also
in a very discreditable way, assisted his brother in obtaining from the
B Zurich company this policy which the Zurich company succeeded in
getting set aside in the proceedings before BRANSON, J. With the
knowledge of H. A. Buck, W. E. Buck put forward to the Zurich company
a proposal in which he put forward the name of H. A. Buck as
the proposer and as the owner of the vehicle. There is no evidence that
C H. A. Buck ever saw this document, but he made a statement, which
has been put in and acted upon, in which he agreed that he knew all
about it, and he assented to his brother's account of this transaction.
It was, therefore, with the approval and permission of H. A. Buck that
W. E. Buck went to the insurance company and forged the name
D of H. A. Buck as the proposed assured. The proposal signed "H. A.
Buck" was in fact signed by W. E. Buck. The following details of
the proposal may be mentioned: "Full name of proposer, Henry
Albert Buck; trade or business, fruiterer and greengrocer." In
fact, H. A. Buck was a butcher, and it was W. E. Buck who was the
E greengrocer. "Business address, 56, Brewery Road, Plumstead."
That in fact was not the business address of H. A. Buck; though he
had a butcher's shop next door at No. 58. "Purpose for which the
vehicle was to be used: own goods." That was untrue, because it
was to be used, not for H. A. Buck's butcher's business, but for W. E.
F Buck's greengrocery business. "Are you the actual owner of the
vehicle? Yes." Then the named driver who, as agent and servant of
the proposer H. A. Buck, is to drive the van is put as William Edward
Buck. With regard to this matter, what H. A. Buck did was this. He
assisted or permitted or stood by while to his knowledge his brother
G W. E. Buck was putting forward this grossly misleading and inaccurate
statement to the insurance company, with the result that his brother did
obtain from the insurance company an insurance policy purporting to
cover Henry Albert Buck, carrying on the business of fruiterer and
greengrocer, in respect of this van. That was the policy, with an
H indorsement stating that it was agreed that it should always be driven
by William Edward Buck, as the servant or driver of H. A. Buck. That
was the policy which, by reason of gross concealment and misrepresentation
in the proposal, had, at the suit of the insurance company, been set
aside. That was the connection which H. A. Buck had with this insurance.
He stood by, knowing that his brother was going to put forward

this preposterous and fraudulent document to the insurance company.

In those circumstances, can it be said that H. A. Buck caused W. E. Buck to use the motor vehicle on the road without there being in force an effective insurance policy against third-party risks ? I do not think that it can. As I have said, I would have been only too glad to be able to decide this appeal in favour of this unfortunate plaintiff, who is apparently left with nothing but a useless claim against W. E. Buck. All that can be said, however, is that H. A. Buck assisted his brother in getting a worthless piece of paper in place of an effective insurance policy. Yet, even if he did that, and it was proved that he did that, I do not see how he can be prosecuted successfully upon an allegation that he had caused W. E. Buck to use the vehicle on the road without an effective policy. In the result, I think that the decision of HILBERY, J., was correct, and that this appeal fails. The respondent to this appeal, H. A. Buck, has appeared in person, and, in those circumstances, the order of the court will be simply that the appeal will be dismissed without costs.

CLAUSON, L.J. : I agree.

CHARLES, J. : I agree.

Appeal dismissed without costs.

Solicitors : *Evill & Coleman* (for the appellant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

R. v. CRONIN.

[COURT OF CRIMINAL APPEAL (Charles, Humphreys and Tucker, JJ.), **February 26, 1940.**]

Criminal Law—Appeal—New trial—Jurisdiction of Court of Criminal Appeal—Trial a nullity—Deputy recorder not qualified for appointment.

The appellant was convicted at a borough quarter sessions of dangerous driving after a trial before one D., who was purporting to act as deputy recorder by virtue of an appointment in writing under the hand of the recorder, who was himself unable to be present. In fact, D. was not a barrister, and was not, therefore, eligible for appointment as a recorder's deputy under the Municipal Corporations Act, 1882, s. 166 (1) :—

HELD : the proceedings were void *ab initio*, and the conviction must be set aside and annulled, and the appellant must appear at the next quarter sessions to take his trial upon the indictment.

[**EDITORIAL NOTE.** In general, the Court of Criminal Appeal has no power to order a new trial, but, where the trial has been a nullity, the prisoner has, in effect, never been tried, and the court can then order him to be tried on the indictment.

AS TO NEW TRIAL IN CRIMINAL CASES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 278, 279, para. 407 ; and FOR CASES, see DIGEST, Vol. 14, pp. 538-542, Nos. 6089-6114.]

Cases referred to:

(1) *Crane* v. *Public Prosecutions Director*, [1921] 2 A.C. 299; 14 Digest 245, *2365*; 90 L.J.K.B. 1160; 125 L.T. 642; 15 Cr. App. Rep. 183; *affg.* S.C. *sub nom. R.* v. *Crane*, [1920] 3 K.B. 236.

(2) *R.* v. *Baker* (1909), 2 Cr. App. Rep. 249; 14 Digest 225, *2099*.

APPEAL against a conviction for dangerous driving at Bury St. Edmunds Borough Sessions on Jan. 31, 1940. The facts are fully set out in the judgment of the court delivered by CHARLES, J.

J. A. Boyd-Carpenter for the appellant.

S. Cope Morgan for the Crown.

CHARLES, J. [delivering the judgment of the court]: In this case, Terence Cronin is an appellant before this court in somewhat unusual circumstances. Before Sir Francis Dunnell, who was purporting to act as deputy recorder of Bury St. Edmunds at the borough sessions, he was found guilty of dangerous driving, and on Jan. 29 he was sentenced, in accordance with what was supposed to be a true verdict, to 9 months' imprisonment, and was disqualified from holding a driving licence for 5 years. He appeals against that conviction in somewhat unusual circumstances.

The recorder of Bury St. Edmunds was unable to appear at the borough sessions, having been detained unavoidably by the extremely severe weather, so in writing under his own hand, he appointed as his deputy Sir Francis Dunnell, who is chairman of the county quarter sessions. That course was agreed to by all parties. In truth and in fact, Sir Francis Dunnell was not a barrister at all, and he was never eligible for appointment as a recorder's deputy, inasmuch as the appointment of a deputy recorder depends upon the Municipal Corporations Act, 1882, s. 166 (1), which provides as follows:

> The recorder may, in case of sickness or unavoidable absence, appoint, by writing signed by him, a barrister of 5 years' standing to act as deputy recorder at the quarter sessions then next ensuing or then being held, and not longer or otherwise.

It is perfectly plain that, that error having been made, the court was not so constituted as to be empowered to try anyone at all for anything, and the proceedings were, indeed, void *ab initio*.

What is the proper course to take in order that this unfortunate mistake, for mistake it was, shall be remedied? I think that it should be remedied in this way. I am now reading from the opinion of VISCOUNT FINLAY in *Crane* v. *Public Prosecutions Director* (1). I need not go into the facts of that case, but I desire to read these words. In that case, there was made an order which the House of Lords said was correct. The EARL OF READING, L.C.J., in giving judgment in the Court of Criminal Appeal, after stating the course of the proceedings, said ([1921] 2 A.C. at p. 311):

> "At the trial, as we now know, both Morton and Crane were given in charge to the same jury, as if they had been jointly indicted under one indictment, whereas in truth there were separate indictments. The result is that there never has been

> a trial at all. It is sufficient for this court to say that the proceedings were void *ab initio.* It has been argued that the proceedings were only irregular, and that where there was an irregularity in procedure, the court could not treat the trial as a nullity. But that argument cannot be accepted. The court must view the proceedings as if there had been no trial at all."

It appears that the position here is the same. We therefore propose to take the same course as was taken by the EARL OF READING, L.C.J., in *Crane's* case (1) and specifically approved by the House of Lords. The EARL OF READING, L.C.J., after quoting two cases, continues as follows ([1921] 2 A.C. at p. 311):

> "These cases are, in our opinion, authority for the course which this court proposes to take in this case, that is, to treat the verdict and sentence as a nullity. Following the course taken in *R.* v. *Baker* (2), the verdict and sentence are expunged from the record. That being so, there is the indictment against the appellant on which no trial has taken place. He must stand his trial on that indictment."

Then the terms of the order are set out, and the order of this court in this case will be in the same terms and as follows:

> Upon consideration being this day had by the Court of Criminal Appeal, as duly constituted for the hearing of appeals under the Act, of the appeal of the abovenamed appellant against conviction, the court doth finally determine the same and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled, and that the appellant do appear at the next quarter sessions to be holden in and for the borough of Bury St. Edmunds, there to take his trial according to law upon the said indictment.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Partridge & Wilson* (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BAYLISS *v.* CHATTERS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Hilbery, JJ.), **January 17, 1940.**]

Rates and Rating—Liability to be rated—Beneficial occupation—Bungalows advertised to be let furnished or unfurnished—Whether owner in beneficial occupation.

The appellant owned 4 bungalows, which were let furnished from time to time from early in 1937 till Sept. 30, 1938. From that date, however, they were at all times uninhabited. The furniture was removed and the water was turned off. The furniture, however, was stored in a fifth bungalow and a sixth was used for show purposes. Both these bungalows were in the same place and owned by the appellant. The appellant was willing at all times of the year to let the bungalows, either furnished or unfurnished, and they were in the hands of an agent for that purpose, and were advertised as being so to let. It was contended by the respondent, the collector of rates for the urban district in which the bungalows were situated, that the appellant was in beneficial occupation of the bungalows from and after Sept. 30, 1938:—

HELD: the appellant was in beneficial occupation of the bungalows at the material time.

[**EDITORIAL NOTE.** Beneficial occupation is not defined by statute, and is said not to have been exhaustively defined by judicial decisions. Actual physical occupation is not essential, and in many cases an intention to occupy or to return to occupation has been held sufficient. There seems to have been a general impression that, if all the furniture is removed from premises and they are being offered for sale or letting, those facts are conclusive against beneficial occupation. The present case, however, shows that there are cases where such evidence is not sufficient.

As to Beneficial Occupation, see HALSBURY, Hailsham Edn., Vol. 27, pp. 351-353, para. 782; and for Cases, see DIGEST, Vol. 38, pp. 427-440, Nos. 27-112.]

Cases referred to:

(1) *Bootle Overseers* v. *Liverpool Warehousing Co.* (1901), 85 L.T. 45; 38 Digest 426, *14*.

(2) *Gage* v. *Wren* (1902), 87 L.T. 271; 38 Digest 435, *87*.

Case Stated by justices for the petty sessional division of Lexden and Winstree in the county of Essex. The facts are fully set out in the judgment of Lord Hewart, L.C.J.

F. D. Levy for the appellant.

Arthur Capewell for the respondent.

Lord Hewart, L.C.J.: This is a case stated by justices for the petty sessional division of Lexden and Winstree in the county of Essex. The case arose upon a complaint made by the present respondent, who is a collector of rates for the West Mersea Urban District Council, that the present appellant:

> . . . being a person duly rated and assessed to the general rate of the district in the sum of £9 2*s*. had not paid [any part of that sum].

The case sets out various facts which were proved or admitted. It appears, among other things, that the appellant was the owner of 6 bungalows in West Mersea assessed at £11 gross and £7 rateable in each case, and that rates were being claimed in respect of 4 of those bungalows for the half-year ending Mar. 31, 1939. The case further finds that the bungalows were let furnished from time to time from the early part of 1937 until Sept. 30, 1937, and afterwards from Apr. 1, 1938, to Sept. 30, 1938, and that at all other times these bungalows were uninhabited. The appellant removed the furniture from the bungalows about Sept. 30, 1938, but he removed it to store it in the fifth bungalow, while he left the sixth bungalow furnished for show purposes. He displayed notices in the window of each bungalow to the effect that the bungalows were to be let. The case further finds that there were no fireplaces in the bungalows, and that after Sept. 30, 1938, the appellant caused the water to be turned off, so that there was no water service in the bungalows. Finally, it was found that the appellant was at all times of the year willing to let all or any of the bungalows, either furnished or unfurnished, if a tenant or tenants could be found. The bungalows were in the hands of an agent for the purpose of finding tenants at any time of the year, either furnished or unfurnished, and they were advertised as being to let either furnished or unfurnished.

In those circumstances, and on those facts, it was contended on the part of the respondent that the appellant was in beneficial occupation of the bungalows from and after Sept. 30, 1938, and was, therefore, liable to be rated. On the other hand, the appellant contended that he was not in beneficial occupation from and after Sept. 30, and was not liable to be rated. The justices, having that contest before them, came to the conclusion that the appellant was in beneficial occupation of the bungalows from and after Sept. 30, 1938, and was, therefore, liable, and have accordingly ordered that a distress warrant be issued.

The question for this court is whether, upon the above facts, the justices came to a correct decision in point of law. There was a time when counsel for the appellant appeared to suggest that the justices had misdirected themselves as to the true meaning of the expression "beneficial occupation." There is no evidence of that misdirection in the case. It appears to me that, upon this case as stated, there were facts before the justices upon which they were entitled to come to the conclusion that, at the material time, there was beneficial occupation of the bungalows. Having relevant evidence before them, the justices came to that conclusion and acted upon it. It seems to me that it is not correct to say—and, indeed, I do not recollect that it has been said—that there was no evidence upon which the justices could find that there is beneficial occupation, and I think that there are no materials to indicate that the justices misinterpreted the expression "beneficial occupation."

Our attention has been directed, among other cases, to *Bootle Overseers* v. *Liverpool Warehousing Co.* (1), and to *Gage* v. *Wren* (2), and, not least, to the judgment in that case of CHANNELL, J. In my opinion, the justices, upon the evidence given and the relevant facts which were proved, were entitled to come to the conclusion that there was beneficial occupation, and I think, therefore, that this appeal fails.

HUMPHREYS, J.: I agree, and I have nothing to add.

HILBERY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Wilberforce Allen & Bryant*, agents for *F. S. Collinge & Co.*, Colchester (for the appellant); *Berrymans*, agents for *Page & Ward*, Colchester (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re HENDERSON, PUBLIC TRUSTEE *v.* REDDIE AND OTHERS.

[CHANCERY DIVISION (Morton, J.), **February 14, 22, 1940.**]

Wills—Apportionment—Tenant for life—Interest accruing after death of tenant for life—Interest payable in respect of period before death of tenant for life—Residuary estate—Appropriation without sale—Right of legal personal representative of tenant for life—Apportionment Act, 1870 (*c.* 35), *ss.* 2, 3, 4, 5.

By his will, dated June 18, 1907, the testator directed his trustees, *inter alia*, to set apart the sum of £150,000 and to invest the same and pay the income thereof to one B. during her life, and after her death to raise out of that fund the sum of £100,000 to be held upon trust for the upkeep of a certain house which the testator desired to be used as a convalescent home. The residuary estate was then left to a number of charities. The testator died in 1933, and the trustees duly set apart the sum of £150,000 for investment to pay the income thereof to B. B. having died on July 6, 1939, two weeks after her death the trustees appropriated certain investments forming part of the fund of £150,000 for the purpose of raising the fund of £100,000, as provided by the will. By the terms of the will, the trustees were under no obligation to sell any of the investments representing the fund of £150,000. After the date of appropriation, certain interest was paid on the investments so appropriated, the interest so paid being in respect of a period commencing before, and ending after, B.'s death. Thereupon, the executors of B. claimed that that part of the interest which had accrued up to the date of B.'s death was payable to them as legal personal representatives of B. :—

HELD : this was not a case of sale, but one of appropriation of investments, and the decision in *Re Firth, Sykes* v. *Ball* (2) had to be distinguished. The interest which had accrued in respect of the period before B.'s death was payable to B.'s legal personal representatives, in accordance with the Apportionment Act, 1870, s. 2.

[**EDITORIAL NOTE.** The judgment of FARWELL, J., in *Re Firth, Sykes* v. *Ball* (2) would, upon its language, appear to apply both to the case of a sale of investments *cum* dividend and to that of an appropriation *cum* dividend. It is clear from the judgment in this case that it was intended to apply to a sale only, and that the case of an appropriation where the investments are retained by the trustees is a proper one for apportionment.

AS TO APPORTIONMENT AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN, see HALSBURY, Hailsham Edn., Vol. 29, pp. 653-655, paras. 935-939 ; and FOR CASES, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.]

Cases referred to :

(1) *Re Muirhead, Muirhead* v. *Hill*, [1916] 2 Ch. 181 ; 20 Digest 282, *110* ; 85 L.J.Ch. 598 ; 115 L.T. 65.

(2) *Re Firth, Sykes* v. *Ball*, [1938] Ch. 517 ; *sub nom. Re Firth, Sykes* v. *Hall*, [1938] 2 All E.R. 217 ; Digest Supp. ; 107 L.J.Ch. 251 ; 158 L.T. 489.

(3) *Re Winterstoke's Will Trusts, Gunn* v. *Richardson*, [1938] Ch. 158 ; [1937] 4 All E.R. 63 ; Digest Supp. ; 107 L.J.Ch. 122 ; 158 L.T. 404.

(4) *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241 ; 40 Digest 678, *2145* ; 65 L.J.Ch. 597 ; 74 L.T. 409.

(5) *Re Walker, Walker* v. *Patterson*, [1934] W.N. 104 ; Digest Supp.

ORIGINATING SUMMONS to determine whether or not the income of a certain trust fund was apportionable in respect of payments which had accrued before the death of the tenant for life, but were not made until after such death, and on what basis that fund had to be valued. The facts are fully set out in the judgment.

Leslie Mumford for the plaintiff.

John Pennycuick for the first and second defendants, the executors of the will of the tenant for life.

Hector Hillaby for the third defendant, the Hampstead General and North-West London Hospital.

A. Andrewes Uthwatt for the Attorney-General.

MORTON, J.: The testator, James Stewart Henderson, by his will, dated June 18, 1907, appointed David George, William Robert Kington Gibbs and William Littlejohn Law to be executors and trustees thereof. Clause 11 of his will is as follows:

> I direct my trustees out of my estate to set apart the sum of £150,000 and to invest the same in their names in manner permitted by law for the investment of trust money with power to vary investments and to pay the income of the invested fund to the said Alicia Frances Burkitt during her life for her separate use without power of anticipation and after her death to raise out of such fund or so far as it may be insufficient out of my residuary estate the clear sum of £100,000 to be held upon the trusts hereinafter declared concerning the same and to stand possessed of the balance if any of such fund and the income thereof as part of my residuary estate.

Clause 12, so far as material, is as follows:

> I give to my trustees hereinbefore named and their heirs my freehold house at Hastings called "Abbotsford" and the stables outbuildings gardens pleasure grounds and land held therewith upon trust that my trustees shall permit the said Alicia Frances Burkitt during her life to have the use and enjoyment thereof for her separate use without power of anticipation she paying all rates and taxes and keeping the buildings in a proper state of repair and properly insured against fire as from the day of my death to the satisfaction of my trustees and after her death shall stand possessed thereof upon trust to permit the same to be used and forever enjoyed as a convalescent home for the benefit of poor and necessitous persons residing within the borough of Hampstead and I further direct my trustees to invest the sum of £100,000 bequeathed by the last preceding clause in their names in any investments by law authorised to trustees with power to vary investments and to employ and apply the income of the invested fund as an endowment for the upkeep insurance and maintenance of the said house and grounds for the purposes of such convalescent home and for carrying on such home to the best advantage and in the best interest of the inmates and staff.

Clause 12 also gave the trustees certain powers, but these are not material for the present purpose.

Clause 15 of his will provides as follows:

> . . . all the rest residue and remainder of my real and personal estate of whatsoever kind and wheresoever situate of or over which I shall at my death be possessed or have any power of appointment or disposition I give devise and bequeath to my said trustees hereinbefore named upon trust to sell call in collect and convert into money the said real and personal estate at such time or times and in such manner as shall seem expedient and out of the net proceeds and any ready money forming part of my estate to pay and provide for my funeral and testamentary expenses and debts and the pecuniary legacies and annuities bequeathed by this my will or any codicil thereto and all death duties payable under my will and subject as aforesaid to stand possessed thereof in trust [for 31 charitable institutions therein specifically named, of which the defendant the Hampstead General and North-West London Hospital is one] and also such other charitable institutions or purposes (if any) as my trustees may in their absolute discretion nominate and select.

Then the testator directed that the shares and the manner in which, and the conditions, if any, under which, his residuary estate was to be divided pursuant to the clause were to be in the absolute discretion of his trustees. The rest of the will is not material to be stated. By a codicil, dated Jan. 17, 1933, the testator made an alteration in his executors and trustees, but in all other respects confirmed his will.

The testator died on Jan. 20, 1933, without having revoked or altered his will except by the codicil, and his will and codicil were duly proved by the plaintiff and the defendant Charles Dewen Thomson on Feb. 28, 1933, in the principal Probate Registry. The plaintiff and the defendant Charles Dewen Thomson as executors and trustees of the will duly set apart the sum of £150,000, and invested that sum in accordance with the directions in that behalf contained in cl. 11 of the testator's will, and they paid the income of the invested fund received by them up to the death of Alicia Frances Burkitt to Alicia Frances Burkitt. Alicia Frances Burkitt died on July 6, 1939, having by her will appointed the defendant Samuel George Reddie and the defendant Charles Dewen Thomson to be the executors and trustees thereof. Her will was duly proved by the executors therein named on Sept. 4, 1939.

On July 25, 1939, the plaintiff and the defendant Charles Dewen Thomson, as trustees of the testator's will, appropriated certain investments forming part of the £150,000 fund to answer the "clear sum of £100,000." mentioned in cl. 11 of the will. These investments were £29,490 5*s.* 2*d.* 3½ per cent. war loan, £50,000 3 per cent. conversion stock 1948-1953, £5,200 Brighton Corporation 3 per cent. stock 1933-1953, £10,000 City of Bath 3½ per cent. mortgage, and £10,000 Nottingham Corporation 3[illegible] per cent. mortgage.

It is to be observed that by cl. 11 the trustees are directed to "raise" this sum out of the £150,000 fund, and by cl. 12 they are directed to "invest" this sum in any investments authorised by law to trustees, but there is no doubt, in my view, that the trustees could properly appropriate investments of a nature authorised by law, and of the value of £100,000, in satisfaction of this sum of £100,000, without going to the trouble and expense of selling out and reinvesting. For reasons which will appear later, I do not think that the trustees valued these investments on the correct basis, but I shall return to this point when I have decided the question specifically raised by the originating summons.

This question arises in the following circumstances. After the date of appropriation—namely, July 25, 1939—the trustees received certain interest on the appropriated investments which was paid in respect of a period commencing before the death of Alicia Frances Burkitt and ending after that death. For convenience, I refer to the sums so received as interest, but it makes no difference to the question which I have to decide if they fall more aptly under the description of "dividends" or of "other periodical payments in the nature of income." There can be no doubt, in my view, that they fall within the Apportionment Act, 1870, s. 2, which I shall quote hereafter. The defendants Reddie and Thomson, as executors of Alicia Frances Burkitt, claim that the proportion of this interest which accrued up to the date of her death ought to be paid to them as her legal personal representatives. I have to decide whether or not this claim is well-founded.

The Apportionment Act, 1870, s. 2, provides as follows:

> From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Sect. 5 provides as follows:

> . . . the word "rents" includes rent service, rentcharge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe. The word "annuities" includes salaries and pensions. The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared, at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

In view of sect. 2, the interest in question must be considered as accruing from day to day, "and must be apportionable in respect of time accordingly." Sect. 3 of the Act, so far as is material, provides as follows:

> The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before . . .

Sect. 4, so far as is material, provides as follows:

> All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively . . .

In *Re Muirhead, Muirhead* v. *Hill* (1), EVE, J., observed, at pp. 185, 186:

> In my opinion, whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation.

With that observation I respectfully agree.

I now proceed to apply the Apportionment Act, 1870, as interpreted in *Re Muirhead, Muirhead* v. *Hill* (1), to the facts of the present case. The investments in respect whereof the interest in question was paid are still in the hands of the trustees of the testator's will. The trustees have received the interest in question. This interest must be considered as accruing from day to day, and is apportionable in respect of time accordingly. A portion of the interest, therefore, accrued during the life of Alicia Frances Burkitt. Unless the appropriation made on July 25, 1939, in some way defeats the rights of her legal personal representatives, her legal personal representatives are clearly entitled to the portion which accrued during her life. Can the appropriation defeat the rights of the legal personal representatives ? In my judgment, it cannot. The Apportionment Act, 1870, was brought into operation in regard to the interest in question at the lady's death. The interest in question became due and payable to the trustees at a subsequent date, and was in fact paid to them. On receiving this interest, they were bound to give effect to the rights which had come into existence under the Apportionment Act, 1870, and to pay to the legal personal representatives the portion of such interest which accrued during the lady's lifetime. For the moment, I pass over the question as to what would have been the position if the trustees had sold the investments producing this interest, or had transferred these investments to persons absolutely entitled thereto under the testator's will, between the date of the lady's death and the date on which the interest in question became payable. The investments were not so sold or transferred, but were still in the names of the trustees. In these circumstances, I can see no answer to the claim of the legal personal representatives of Alicia Frances Burkitt.

Having arrived at this conclusion by the process of applying the words of the Apportionment Act, 1870, as interpreted in *Re Muirhead*, *Muirhead* v. *Hill* (1), to the facts of the present case, I must now consider whether there is any authority which leads me to a different conclusion. As will appear, I do not think that there is any such authority, but it is necessary for me to consider carefully *Re Firth*, *Sykes* v. *Ball* (2), and counsel for the Attorney-General has urged me to deal generally with the duty which trustees owe to the legal personal representatives of a deceased tenant for life when investments on which dividends are accruing at the death of the tenant for life are sold by the trustees, or transferred to beneficiaries by the trustees before such dividends have become due and payable. He stated that recent decisions have raised doubts on this matter, and he referred in particular to an apparent conflict (i) as to investments so sold, between the decision of CLAUSON, J., in *Re Winterstoke's Will Trusts*, *Gunn* v. *Richardson* (3) and the views expressed by STIRLING, J., in *Bulkeley* v. *Stephens* (4), and by FARWELL, J., in *Re Firth*, *Sykes* v. *Ball* (2), and (ii) as to investments so transferred, between a portion of the decision of FARWELL, J., in *Re Firth*, *Sykes* v. *Ball* (2) and the views expressed by STIRLING, J., in *Bulkeley* v. *Stephens* (4). I think that I ought to accede to the request of counsel for the Attorney-General, having regard to the facts that the present case involves a consideration of *Re Firth*, *Sykes* v. *Ball* (2) and that the judgment in *Re Firth*, *Sykes* v. *Ball* (2) contains a full discussion of the decisions in *Bulkeley* v. *Stephens* (4) and *Re Winterstoke's Will Trusts*, *Gunn* v. *Richardson* (3).

I propose to assume that A. B. is entitled under a will to receive during his life the income of a trust fund consisting of a number of investments. At the date of A. B.'s death, a dividend, as defined in the Apportionment Act, 1870, is accruing on each of these investments. At the date when any such dividend becomes due and payable, the trustees of the will may still retain the investment in respect whereof the dividend is payable, or they may have parted with the investment in a variety of circumstances. I propose to examine three cases. First, let me examine Case A. The investment in respect whereof the interest or dividend is payable is still held by the trustees of the will on the date when the dividend becomes due and payable. In this case, for reasons which I have already stated, the general rule is that the trustees must pay over the proper apportioned part of the dividend to the legal personal representatives of A. B. I do not think that it makes any difference whether at this date the trustees held the investment on trust to pay the income thereof to a tenant for life whose life interest arose on the death of A. B., or on trust for a person absolutely entitled thereto, or on trust to divide it among a number of persons absolutely entitled. Nor do I think that it makes any difference if a trust for sale, not yet carried out, arose on the death of A. B. If the trustees receive the dividend, a portion of it belongs to the estate of A. B. There may be exceptions to this general rule, but no exception occurs to me at the moment. Now I come to Case B. The investment in respect whereof the interest or dividend is payable has been transferred to a person absolutely entitled under the will, or divided among a number of persons absolutely entitled under the will, before the dividend becomes due and payable. In my view, the trustees ought not so to have transferred the investment without making some arrangement to ensure that the legal personal representatives of A. B. would be able to obtain payment of the proper apportioned part of the dividend. Let me assume, however, that the trustees have transferred the investment in question before the dividend becomes due and payable to some person or persons absolutely entitled to the capital, without making any arrangement as to the apportioned part of the dividend. Is the right of the legal personal representatives of the tenant for life thereby defeated? In my opinion, it is not. The transferees claim under the same will which directed payment of the income to A. B. during his life. They have received a dividend, a portion whereof belongs to the estate of A. B., and, in my view, they are bound to pay it over to his legal personal representatives. I think, however, that, if the trustees procure a valuation of an investment with a view to its appropriation in satisfaction, or in part satisfaction, of a share in the trust fund, the valuation should take into account the fact that no such appropriation can defeat the claim of the legal personal representatives of A. B. to an apportioned part of the dividend.

In *Bulkeley* v. *Stephens* (4), the tenant for life died on Sept. 2, 1894. Certain stock was sold *cum* dividend on Jan. 29, 1895, under an order of the court dated Nov. 12, 1894. In June, 1895, a " balance dividend " was declared in respect of the year ending Dec. 31, 1894. STIRLING, J., said, at pp. 249, 250:

> In the present case the trust at the death of the tenant for life is thus expressed: " To pay, transfer and assign my residuary estate and the stocks funds and securities upon which the same shall be invested unto and amongst " a particular class of beneficiaries, who have been proved to be very numerous. That trust would be properly carried out, not by sale of the investments, but by transfer of them to the beneficiaries; and, if so carried out, it would be the duty of the trustee so to transfer that the legal personal representative of the tenant for life should be able (either directly or through the intervention of the trustee) to obtain payment of the apportioned part of the dividend to which the tenant for life was entitled. The order of Nov. 12, 1894, was made, not in the execution of any trust or power for sale vested in the trustees, but in order to facilitate the division of the testator's residuary estate. I do not doubt that the order was properly made, but it was made in the absence of the legal personal representatives of Mrs. Lyne Stephens [the tenant for life]. If those legal personal representatives had been present they might have urged with success that Mrs. Lyne Stephens' estate ought not to be placed in a worse position than if the trust had been carried out in the strict and proper mode—namely, by transfer to the legatees. That being so, I think that the legal personal representatives may still assert the same right; and, under these particular circumstances, the application ought to be acceded to.

This passage seems to show quite clearly that in Case B the legal personal representatives of A. B. would be entitled to an apportioned part of the dividend, and that this right would not be defeated by any transfer to the persons entitled to the capital. In the particular circumstances of the case before him, STIRLING, J., acceded to the claim of the legal personal representatives even although the stock had been sold, and his reason was that the legal personal representatives [p. 250]

> . . . ought not to be placed in a worse position than if the trust had been carried out in the strict and proper mode—namely, by transfer to the legatees.

By these words he intimates quite plainly that, in his view, the claims of the legal personal representatives of the tenant for life would not have been defeated if the investments had been transferred to the legatees. For my own part, I cannot see any reason why these claims should be so defeated. A doubt was raised in my own mind, however, by a few words in the judgment of FARWELL, J., in *Re Firth, Sykes* v. *Ball* (2), and by one branch of his decision in that case. In *Re Firth, Sykes* v. *Ball* (2), FARWELL, J., had to deal with two cases—namely, (i) the case where investments had been sold *cum* dividend at a date between the death of the tenant for life and the payment of the dividend which was accruing at her death, and (ii) the case where investments had been appropriated and transferred to beneficiaries *cum* dividend at a similar date. His decision appears to have had the result that in neither case did the legal personal representatives of the tenant for life receive an apportioned part of the dividend, or any sum representing such apportioned part. FARWELL, J., began his judgment by referring to " such investments as were sold or appropriated *cum* dividend," and it would appear that his decision may have covered the investments appropriated and transferred to beneficiaries as well as the investments sold. So far as it related to the investments sold, I entirely agree with it, as will appear hereafter. So far as it related to the investments appropriated and transferred to beneficiaries, it would seem to be in conflict with the observations of Stirling, J., in *Bulkeley* v. *Stephens* (4), which I have already quoted, and it might also have some bearing on the present case. It would be possible to distinguish the decision of Farwell, J., on this point from the present case on the ground that Farwell, J., was dealing with appropriations which had been carried out by transfers to the beneficiaries, while I am dealing with an appropriation which results in the investments still being held by the trustees of the will. In the case before me, the trustees actually received the interest whereof a proportion is claimed by the legal personal representatives of the tenant for life. In *Re Firth, Sykes* v. *Ball* (2), the dividends or interest on the appropriated investments were received by the beneficiaries. It seemed to me, however, that this was not a very satisfactory distinction, since I could see no good reason why the beneficiaries to whom investments were transferred in *Re Firth, Sykes* v. *Ball* (2) should be able to retain, as against the legal personal representatives of the tenant for life, the portion of the dividends which accrued during the life of the tenant for life. Further, I observe that the argument as reported was directed only to the case of the investments which had been sold, and the reasoning of the judgment also appeared to be directed to those investments only. For this reason, I discussed *Re Firth, Sykes* v. *Ball* (2) with Farwell, J., before writing this judgment, and he has informed me that, when he delivered that judgment, his mind was directed only to the case of the investments which had been sold. In these circumstances, I cannot regard *Re Firth, Sykes* v. *Ball* (2) as being an authority for the proposition that the claim of the legal personal representatives of the tenant for life can be defeated by a transfer of investments in respect whereof dividends were accruing at the death of the tenant for life to persons becoming absolutely entitled to the trust fund on the death of the tenant for life. The headnote to that case, which refers only to the case of investments which had been sold, is, in my view, quite correct.

I now come to the third of the three cases which I set out to examine—Case C. The investments in respect whereof the interest or dividend is payable have been sold by the trustees *cum* dividend. That is to say, they have been sold together with the dividend which was accruing at the date of the death of the tenant for life. In this case, the dividend is received by the purchaser, who has contracted that he shall receive it. He cannot, of course, be called upon to pay over any part of it to the legal personal representatives of A. B., but the question arises whether or not the legal personal representatives of A. B. are entitled to receive from the trustees any part of the proceeds of sale. At first sight, it would seem just that they should receive some part of these proceeds. If the investment had not been sold before the dividend became due and payable, or had been sold *ex* dividend, the legal personal representatives of A. B. would have been entitled to receive a part of the dividend and it is reasonable to assume that the purchase price was greater to some extent by reason of the fact that the investment was sold *cum* dividend. In my view, however, the general rule is that there is no apportionment of the purchase price in favour of the legal personal A representatives of the tenant for life. This general rule was recognised by STIRLING, J., in *Bulkeley* v. *Stephens* (4), and was recognised and applied by CLAUSON, J., in *Re Walker, Walker* v. *Patterson* (5), and by FARWELL, J., in *Re Firth, Sykes* v. *Ball* (2). In *Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (3), CLAUSON, J., did not think it right to B apply the rule on the facts of the case before him. It would appear from the report of this case that the attention of CLAUSON, J., was not drawn to his previous decision in *Re Walker, Walker* v. *Patterson* (5) but I appeared as counsel in *Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (3), and I have a recollection that I cited *Re Walker, Walker* C v. *Patterson* (5) in my argument, and submitted that the facts in *Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (3) justified a departure from the general rule. Whether or not my recollection is accurate, I respectfully agree with the judgment of FARWELL, J., in *Re Firth, Sykes* v. *Ball* (2) in regard to the investments which had been sold, D and I also respectfully agree with his observations on *Re Winterstoke's Will Trusts, Gunn* v. *Richardson* (3).

I desire to add only a few brief observations. When an investment has been sold *cum* dividend after the death of a tenant for life, and the trustees ascertain that a dividend was subsequently declared and E paid to the purchaser in respect of a period beginning before the date of the death of the tenant for life and ending after that date, there is, of course, no difficulty in determining what proportion of that dividend accrued during the life of the tenant for life. It is a mere matter of arithmetic, and the sum of £2,160 13*s*. 1*d*., which in *Re Winterstoke's* F *Will Trusts, Gunn* v. *Richardson* (3) was directed to be paid to the executors of the tenant for life, was a sum ascertained by this arithmetical calculation. It is, however, a very different matter if one endeavours to ascertain by what sum the purchase price was increased by reason of the fact that a dividend was accruing at the date of the sale. Let me G assume that the dividend is paid half-yearly, that the tenant for life dies when three months of the half-year have expired, and that the investment is sold two months later. Can it ever be ascertained with accuracy what portion of the purchase price represents five-sixths of the half-yearly dividend which is accruing? I suspect that the cases H in which this could be ascertained with accuracy are rare, and, if so, it seems difficult to justify the payment to the legal personal representatives of the tenant for life of a sum equal to one-half of the half-yearly dividend which is accruing. This consideration seems to me to afford some justification for the general rule which is, in my view, applicable to Case C.

Counsel for the hospital suggested that the appropriation made by the trustees in the present case was equivalent to a sale of the investments so appropriated and a re-investment of the proceeds of sale. He described it as a notional sale *cum* dividend and investment of the proceeds of sale, and he drew attention to the fact that the will directs the "raising" of a sum of £100,000 and the subsequent investment thereof. On this footing, he suggested that the present case fell within Case C, and that there should be no apportionment. I decline to deal with the matter on the footing that the trustees sold the investments in question on July 25, 1939, and received £100,000 as the proceeds of sale. I think that it is right to deal with the matter on a more realistic footing. The trustees did not sell these investments, and the interest in question was not received by a purchaser from them. It was received by the trustees, and part of the interest so received belongs, in my view, to the tenant for life.

I must now deal with the question whether, in view of my decision as to apportionment, the trustees have valued the appropriated investments on the correct basis. In my judgment, they have not, since they valued the investments on the basis that no part of the accruing interest was payable to the legal personal representatives of the tenant for life. Counsel for the Attorney-General suggests that a further sum, equivalent to the sum payable to the legal personal representatives of the tenant for life, ought to be appropriated in order to make the appropriated sums up to £100,000. Counsel for the hospital very properly states that he cannot resist this claim. This must be done, and I shall give general liberty to apply, in case any difficulty arises in regard to this or to any other matter.

Declaration that the income was apportionable, and the fund had to be valued on the basis that the income was so apportionable. Costs as between solicitor and client payable out of fund.

Solicitors: *Waltons & Co.* (for the plaintiff and for the first and second defendants); ***R. S. Fraser & Co.*** (for the third defendant); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

Re BLAIBERG, BLAIBERG AND ANOTHER *v.* DE ANDIA YRARRZAVAL (MARQUISE) AND ANOTHER.

[CHANCERY DIVISION (Morton, J.), **February 28, 1940.**]

Wills—Conditions—Forfeiture—Uncertainty—"Marry any person not of the Jewish faith."

The testator by his will declared that, "should any child or grandchild of [his] at any time . . . marry any person not of the Jewish faith," such child or grandchild should forfeit his or her interest under the will or any codicil thereto. A grandchild who benefited under a codicil to the will married D.K., and the affidavit in support of the summons for the determination of the question whether the interest was forfeited stated: " . . . it being understood by such [grandchild] that D.K. was not of Jewish ancestry and that at the time of such marriage he was not of and did not profess the Jewish faith":—

HELD: the condition was far too uncertain for the court to give effect to it.

[EDITORIAL NOTE. The Privy Council has recently stated that the guiding A principle in considering the certainty of a condition of forfeiture is that the court at all times can say definitely whether or not that which has been done amounts to a forfeiture. The judgment herein considers carefully the difficulty of ascertaining whether a person holds a particular belief or faith, and it is stated that this is a question which the court has no means of determining.

AS TO CONDITIONS OF FORFEITURE, see HALSBURY, 1st Edn., Vol. 28, Wills, B pp. 593-595, paras. 1167-1169; and FOR CASE, see DIGEST, Vol. 44, p. 462, No. 2825.

Cases referred to:

(1) *Sifton* v. *Sifton*, [1938] A.C. 656; [1938] 3 All E.R. 435; Digest Supp.; 107 L.J.P.C. 97; 159 L.T. 289.

C (2) *Re Sandbrook, Noel* v. *Sandbrook*, [1912] 2 Ch. 471; 44 Digest 444, *2686*; 81 L.J.Ch. 800; 107 L.T. 148.

(3) *Re Exmouth* (*Viscount*), *Exmouth* (*Viscount*) v. *Praed* (1883), 23 Ch.D. 158; 44 Digest 441, *3668*; 52 L.J.Ch. 420; 48 L.T. 422.

ADJOURNED SUMMONS to determine whether a forfeiture clause contained in a codicil to a will is valid, or whether it is void for uncertainty. D The facts and the relevant portions of the several codicils to the will are fully set out in the judgment.

C. V. Rawlence for the plaintiffs.

H. B. Vaisey, K.C., and *J. F. Bowyer* for the first defendant.

M. Gravenor Hewins for the second defendant.

E

MORTON, J.: In this case, I have to determine whether a forfeiture clause contained in a codicil to the will of Solomon Blaiberg is valid, or whether it is void, as it is suggested to be, on the ground of uncertainty. The parties to the summons are as follows. The plaintiffs F are the surviving legal personal representatives, and are two of the trustees of the will. The defendants are the testator's granddaughter and Alfred Moses Blaiberg, who is the third trustee, and is also interested in the residuary estate.

The testator made his will on June 25, 1902. I do not think it is G necessary for me to read any part of the will for the purposes of this case. There were then a first codicil, which is again immaterial, which confirmed the will in all other respects, and a second codicil, which contained the forfeiture clause in question. It is in the following words:

> And I do hereby declare that should any child or grandchild of mine at any time H whether before or after my decease marry any person not of the Jewish faith such child or grandchild shall forfeit and be deprived of any interest or share under my said will or codicil thereto and my said will and any codicil thereto shall be construed as if such child or grandchild had been dead at the time of his or her contracting any such marriage as above-mentioned.

The third codicil is in the following terms:

> I hereby give to each of my grandchildren living at the time of my decease the sum of £100 such legacy to vest and be payable in the case of a grandson on his

attaining the age of 21 years and in the case of a granddaughter on her attaining that age or marrying under that age provided in any case no marriage as forbidden by me has been contracted.

That codicil bears the same date as that of the second codicil.

There is then a very long fourth codicil, in which the testator, except in certain respects, revokes the provisions of his will and former codicils in regard to the residue of his estate, He deals with his residue in a manner which I need not specify for the benefit of his one daughter and his six sons and their respective families. Clause 20 of the fourth codicil is as follows: A

> I further declare that if any son daughter or grandchild of mine or the widow of any son of mine shall at any time hereafter and either before or after my death cease or fail to profess or intermarry with any person who shall not profess the Jewish faith then and in any such case such son daughter grandchild or widow shall thereupon and as from that time forfeit and lose all benefits under my said will or any codicil thereto in like manner in all respects as if he or she had died in my lifetime. But this provision shall not prejudice or affect the interest which any child or children of any son daughter or grandchild of mine suffering such forfeiture as aforesaid would have been entitled to under the foregoing provisions if such forfeiture had not taken place. B C

The testator made fifth and sixth codicils to his will, but they are not material. The granddaughter was born on May 15, 1906, and she was, therefore, born in the lifetime of the testator, who died on Apr. 8, 1909. On Dec. 16, 1924, the granddaughter was married in Paris to one Dimitry Kolomnine, and the affidavit in support of the summons says: D

> . . . it being understood by such defendant that the said Dimitry Kolomnine was not of Jewish ancestry and that at the time of such marriage he was not of and did not profess the Jewish faith.

No further evidence is filed on the matter, and it rests, so far, on this. It is said that the defendant "understood" the matters which I have just mentioned. That marriage was dissolved, and on Apr. 15, 1926, the granddaughter was married in London to the Marquis de Andia Yrarrzaval, but that second marriage was dissolved on July 23, 1931. The executors and trustees of the will have never paid the legacy to the granddaughter, because they took the view that she had forfeited it, and no interest has ever been paid in respect of it. E F

In 1938, a summons was taken out which came before Farwell, J., who delivered judgment on Dec. 14, 1938. He had to decide upon the validity, not of the forfeiture clause which I am considering, but of the forfeiture clause which I have read, which appears in cl. 20 of the fourth codicil. Counsel for the granddaughter suggested—I do not think that I can say that he strenuously argued it—that the forfeiture clause which I have to consider here was superseded by the forfeiture clause of the fourth codicil, and was no longer effective. However, I cannot take that view. I cannot find any revocation of the forfeiture clause in the second codicil, and, further, the legacies given to the grandchildren by the third codicil were given only on condition that no marriage as forbidden by the testator had been contracted. Secondly, counsel for the granddaughter submits that the forfeiture clause is void for G H uncertainty. He does not rely upon any other ground, or suggest that it is void for perpetuity, but he points out that FARWELL, J., found uncertainty in the words, "who shall not profess the Jewish faith," and he argues that the words "any person not of the Jewish faith" are still more uncertain.

A At the conclusion of his judgment, FARWELL, J., stated very definitely that his decision was one on the particular language of that will, and that he did not want it to be taken that his decision in the case created any precedent in any other case, except, possibly, in a case where the language was precisely the same. However, there are passages in the
B judgment of FARWELL, J., apart from the actual decision, which I think are helpful, and to which I shall refer. FARWELL, J., said:

> In construing the clause, it must be borne in mind that this is a forfeiture clause, and, as such, must be construed strictly. It must not be held invalid merely because it is a forfeiture clause if the court is satisfied that it is a certain clause. What exactly is meant in a case of this sort is, I think, illustrated and explained quite
> C plainly in a recent judgment by LORD ROMER in the Privy Council in *Sifton* v. *Sifton* (1). I do not think that it is necessary for me to do more than refer to one passage in that judgment. LORD ROMER says, at p. 670: "In *Re Sandbrook, Noel* v. *Sandbrook* (2), PARKER, J., stated the principle in these words [p. 477]: 'conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur.' In *Re Exmouth* (*Viscount*), *Exmouth* (*Viscount*) v. *Praed* (3), FRY, J., used the following language [p. 164]: "... the condition
> D must be clear and certain. That, in my opinion, includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect.'"

After a further quotation from the judgment in that case, FARWELL, J.,
E continues as follows:

> As I understand that, it is this. A forfeiture clause is not necessarily void because a person may not be able to know whether the thing which he is doing or is proposing to do will necessarily create a forfeiture. On the other hand, however, it must be such a condition that the courts at all times can say definitely that that which has been done amounts to a forfeiture or does not amount to a forfeiture, as the case may be.

F Then FARWELL, J., turns to the words of the clause which he was construing, and adds this:

> In my judgment, the court must be in a position to say whether or not some particular act creates a forfeiture.

G He then considers in more detail the clause to be construed, and says:

> It seems to me that the words "cease or fail to profess" are capable of many meanings, and in many cases it would be impossible, in my judgment, to determine with any certainty whether or not a person had ceased or failed to profess. Whether a person who, while outwardly professing to be a member of the religion, in fact was not a member of it would forfeit under this clause I know not, and it would, I think, be impossible to ascertain.

H As I read that observation, FARWELL, J., is saying: "It is really impossible to ascertain whether or not a person in his own heart, in his own mind, holds a particular religious belief. It is not a matter which the courts can ascertain with certainty."

It seems to me that the clause which I have to construe is still more uncertain than that which had to be construed by FARWELL, J. It seems to me that the question whether or not a person is "of the Jewish faith" is something which lies in his or her own conscience, and is a matter of belief. It is not altogether easy to see in what sense the words are used, but, supposing, for example, that the marriage had taken place in a synagogue, to my mind that would not establish that the other contracting party was of the Jewish faith. A It seems to me that it depends upon whether or not he holds certain beliefs. What the beliefs are which make a man of the Jewish faith or not of the Jewish faith I do not know. It is possible that the court could ascertain that by evidence. I do not know whether or not there would be any difference of opinion among B persons called to define the beliefs which it is necessary for a man to hold in order to be of the Jewish faith, but the further question of whether or not he holds those beliefs, and really believes them, is not, to my mind, a matter which a court can ascertain with certainty. Taking this particular case, and supposing that I held that the condition was a valid one, C I think that I should then have to direct an inquiry as to whether or not Dimitry Kolomnine was, on Dec. 16, 1924, of the Jewish faith. It does not seem to me that that is an inquiry which the court would undertake.

I do not think it is at all easy to see in what sense those words are used, but, if they are used in the sense which I have indicated, it appears to D me that the matter is one far too uncertain for the court to give any effect to them. I adopt the words of FARWELL, J., when he says that the condition must be such:

> . . . that the courts at all times can say definitely that that which has been done amounts to a forfeiture or does not amount to a forfeiture, as the case may be. E

In my view, the condition which I am considering is not such a condition as that, and is void for uncertainty. I do not think that any other authorities are of any real assistance on this question of construction, which turns upon the particular words which this testator has used. No F case has been brought to my attention where this phrase "of the Jewish faith"—or, indeed, a similar phrase referring to any other faith—has been used.

Solicitors: *H. E. Blaiberg* (for the plaintiffs and for the second defendant); *Burton & Ramsden* (for the first defendant).

G

[*Reported by* CHARLES NEWTON, ESQ., *Barrister-at-Law.*]

H

RIPPON *v.* PORT OF LONDON AUTHORITY AND J. RUSSELL & CO. (PORT OF LONDON AUTHORITY, THIRD PARTY).

[King's Bench Division (Tucker, J.), **January 26, 29, 30, 31, 1940.**]

Factories and Shops—Occupier—Public dry-dock—Vessel under repair—Firm of ship-repairers renting dock for purposes of repairing ship—Factories Act, 1937 (*c.* 67), *ss.* 25 (1), 26 (1), 130 (1), 133, 151 (1) (i)—*Shipbuilding Regulations,* 1931 (*S.R. & O.,* 1931, *No.* 133), *reg.* 1.

Tort—Contribution between joint tortfeasors—Occupiers of public dry-dock—Breaches of statutory duty—Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6 (2).

The first defendants were the owners of a public dry-dock and the second defendants were a firm of ship repairers who were repairing a vessel lying in the dock. The plaintiff, an employee of the second defendants, was walking down some steps into the dock, in order to reach the bottom of the ship, when one of the steps gave way under his weight. He fell to the bottom of the dock and sustained serious injuries. It was found that there had been a breach of the Factories Act, 1937, s. 25 (1), in that the steps had not been properly maintained at the time of the accident, and a breach both of sect. 26 (1) of that Act and of the Shipbuilding Regulations, 1931, reg. 1, in that a safe means of access had not been provided. The question arose as to who was the occupier of the dock, and, as such, liable for the defective condition of the steps. The second defendants had applied for the use of, and used, the dock on the terms and conditions contained in their application. The second defendants contended in third-party proceedings that a term must be implied in the contract for the use of the dock that it would be in a safe condition and that the first defendants, the third party, would indemnify them against any damages and costs for which they might be liable by reason of any defect in the condition of the dock:—

Held: (i) the first defendants were the occupiers of the dock for the purposes of the Factories Act, 1937. Although they had permitted the second defendants to use the dock for the purposes of repair, they had themselves throughout retained possession of, and control over, the dock. They were, therefore, liable for the breaches of the Factories Act, 1937, ss. 25 (1), 26 (1).

(ii) the second defendants were notional occupiers under the Shipbuilding Regulations, 1931, for the limited purpose of repairing the ship. They were, therefore, liable for a breach of reg. 1 of those regulations, and for the proportion hereinafter stated of the damages awarded to the plaintiff.

(iii) no such term as that contended for by the second defendants could be implied in the contract for letting the dock, and the claim for a complete indemnity failed. In the circumstances of the case, there would, however, be an order for contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, the first defendants to be liable for three-quarters, and the second defendants for one-quarter, of the amount of the judgment.

[**EDITORIAL NOTE.** This case again explores the meaning of the term "occupier" as used in the Factories Acts and the regulations made thereunder. It is decided that, although the port authority were the occupiers of the dock under the Acts, the ship-repairers were the notional occupiers, so far as the repair of the ship was concerned, within the meaning of the regulations, and the practical result of this decision is that the ship-repairers have to contribute to the damages recovered by the injured workman.

As to Occupier, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174; and for Cases, see DIGEST, Vol. 24, pp. 916-918, Nos. 117-126.]

Cases referred to:

(1) *Smith* v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; Digest Supp.

(2) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; Digest Supp.

(3) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; *on appeal*, [1936] A.C. 206.

ACTION for damages for personal injuries suffered by the plaintiff when he was working at a dry-dock, the property of the first defendants, in the employ of the second defendants. The facts are fully set out in the judgment.

Gilbert J. Paull, K.C., and *S. R. Edgedale* for the plaintiff.

H. U. Willink, K.C., and *F. Wishart* for the first defendants.

G. Russell Vick, K.C., and *Cyril Salmon* for the second defendants.

TUCKER, J.: The claim here is for damages for personal injuries suffered by the plaintiff on Nov. 5, 1938, when he was working at a dry-dock at Millwall in London. He was employed as a foreman boiler-maker plater by the defendants J. Russell & Co., a firm of ship-repairers who, at the time, were executing repairs to the Deido, a ship which was lying in the dry-dock at Millwall, the Port of London Authority being the owners of that dock. In the course of his duties on that day, the plaintiff had occasion to go down some steps down the side of the dry-dock for the purpose of reaching the bottom of the ship. He was carrying a welding plant weighing about 3 lbs. On his way down the steps, something caused him to fall, with the result that he fell to the bottom of the dry-dock and suffered very serious injuries. He sustained a comminuted fracture of the pelvis, and there has been injury to a nerve as a result. He also suffered a fracture of the lower end of the radius of his left arm, and he cannot now use his left arm for any work requiring any strength. He also has arthritis, but the serious part of his injury, in my view, is the result which has followed from this fracture of the pelvis and the damage which has been caused to some nerve in that region.

There have been agreed medical reports in this case, which are Exhibits P. 5 and P 5A, both dated Jan. 22, 1940. One, which is agreed upon by four doctors representing the plaintiff and the defendants, states as follows:

> Mr. Rippon's chief disability at the present time is pain—neuralgic in character—and attributable to involvement of the left pubic nerve in the injury to the pelvis and referred to the distribution of this nerve, that is to the penis, perineum and rectum. It was agreed that this pain was genuine and disabling and that it had led to Mr. Rippon's present nervous condition. It was further agreed that the pain may continue indefinitely or may diminish. If no improvement is obtained in the course of the next six months the question of an operation to divide the left pubic nerve should be raised.

The plaintiff came before me at the end of Jan., 1940, having had this accident in Nov., 1938. It is now agreed that throughout that period he has been suffering intermittent pain almost all the time. He

cannot keep in one position without suffering pain. He relieves it by occasionally standing up and another time sitting down, and the only real relief he gets is when he is lying on his back. That is the agreed condition of the man. It is further agreed that in the general labour market he is unemployable. He has no earning capacity in the open
A labour market, but, because of his great experience in the past, and because he is looked upon by his employers as an admirable servant, they have made use of his services in an advisory and clerical capacity for a limited number of hours a day. That has been going on now since Aug., 1939. At that employment he has been paid his old wages, plus
B the increase of 15 per cent. which there has been in the wages of the trade. That employment has really been of a compassionate nature. It is uncertain how long his employers will be able to go on employing him at that sort of work at that wage. If and when they are not able or willing to continue so to employ him, his prospects of getting any
C employment are negligible. He is a man of 58 years of age. He has been a foreman for 12 years, and he is a man who, it is obvious, is not of the type that desires to exaggerate his injuries, or to remain away from work. From the start, he has been anxious to do some work, and to do it as quickly as possible. In respect of these serious injuries he brings this
D action against both the defendants, claiming against them breaches of statutory duty and negligence.

First of all, with regard to the facts concerning these steps, evidence has been given on behalf of the plaintiff and on behalf of the Port of London Authority, and certain photographs have been put in. There is
E a bundle of large photographs of these steps. I think that one has only to look at the photograph which a witness has sworn as roughly representing the condition of the steps at the material time to see that they are really ruinous. The steps are situate in the middle of the dock, and, by reason of their position, they are very inclined to receive damage
F from ships bumping against the side of the dock. Not only have the steps the irregular and ruinous appearance indicated in that photograph, but also, by reason of the continual damage which they suffer from time to time, they have begun in places to crumble away. The plaintiff, as I have said, was going down these steps, and, as he went down
G them, he passed a man named Lyall who was coming up. On approaching Lyall, the plaintiff took the outside position of the steps, leaving Lyall nearest to the hand-rail which exists along the inside. He had occasion to speak to Lyall about some matter, and, after having spoken to him, he proceeded on his way down the steps, being then on
H the outside position. He put one foot forward, and I am satisfied that, as he did so, a portion of the step which was loose gave way under his foot, with the result that he fell into the dry-dock and suffered the injuries which I have described.

The case is put in several ways. First, it is said that one or other of the defendants is liable for breach of the statutory duty which is imposed upon the occupier of a dry-dock under the Factories Act, 1937. Sect. 151 (1) of that Act provides as follows :

> (i) Any yard or dry-dock (including the precincts thereof) in which ships or vessels are constructed, reconstructed, repaired, refitted, finished or broken up [is a factory for the purposes of that Act].

Sect. 25 (1) provides as follows :

> All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained.

Sect. 26 (1) provides as follows :

> There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work.

Sect. 130 provides as follows :

> (1) In the event of any contravention in or in connection with or in relation to a factory of the provisions of this Act, or of any regulation or order made thereunder, the occupier, or (if the contravention is one in respect of which the owner is by or under this Act made responsible) the owner, of the factory shall, subject as hereinafter in this Act provided, be guilty of an offence.

Sect. 133 provides as follows :

> If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act or of any regulation or order made thereunder, the occupier or owner of the factory shall, without prejudice to any other penalty, be liable to a fine . . .

It appears, therefore, that the occupier is the person responsible for the observance of these statutory duties, except in so far as the statute provides in some sections for the responsibility to be upon the owner. Sects. 25 and 26 are not the sections in respect of which an obligation is laid upon the owner. Accordingly, it is the duty of the occupier of the factory—in this case, the dry-dock—to see that those sections are complied with. Having regard to what I have already said about these steps, I am satisfied that there was in respect of them a breach of sect. 25 (1), in that they had not been properly maintained at the time of the accident.

The evidence was that these steps were being used by the plaintiff for the purpose of performing some duties in connection with the repair of this ship. Nobody inquired precisely what he was going to do. I do not think anybody asked any question with regard to the precise portion of the ship which he was going to visit, but it was plain that he was going to do something with regard to the work being performed on the bottom of the ship, or in that neighbourhood. There is evidence that on the other side of the dock there are two chutes. The chute is a channel down which goods can be shot, and on each side there are steps with hand-rails. Both are on the opposite side of the dock to that where the plaintiff was. No precise evidence was tendered one way or the other as to whether or not those steps on each side of those chutes on the other side of the dock were safe, or what their condition was. Nor was any evidence given with regard to whether or not those chutes would have been a convenient or practicable means of access to the particular spot at which the plaintiff was going to do his work. I think that it is not without interest that, in the preparation of the plan which has been put in evidence by, I think, the Port of London Authority, no other means of access to the bottom of this dock is illustrated except the one which the plaintiff was using. I think that there has also been a breach A of the statutory duty imposed upon the occupier by sect. 26 (1), which provides as follows :

> There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work.

B I am satisfied that the means of access in fact provided for this particular man at this particular time was this stairway, which had not been maintained so as to constitute a safe means of access.

The next step is to ascertain who was the occupier within the meaning of these sections of the Factories Act, 1937. Before doing so, however, I C will refer to the Shipbuilding Regulations, 1931. Those regulations, although dated Feb. 24, 1931, are preserved by the Factories Act, 1937, and provide for certain things to be done by the occupier. Under the heading of " Duties," it is provided as follows :

> It shall be the duty of the occupier to comply with Parts I to VIII of these regulations.

D Reg. 1 provides as follows :

> Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment.

For the reasons which I have already given with regard to sect. 26 of E the Act, I am of opinion that there has been a breach of reg. 1 also. I will deal later with the question of who is the occupier for the purpose of the regulations contained in Parts I to VIII. Before doing so, I merely call attention to the fact that it is provided by the definitions in the regulations that :

> F " Public dry-dock " means any dry-dock which is available for hire.

It is agreed that the dry-dock in this case was a public dry-dock within that definition. Then under the heading " Duties " there is a proviso in these words :

> G Provided that, when a ship is being repaired in *public dry-dock*, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of Parts I to VIII and it shall be his duty to comply with the said Parts, except as follows : . . .

The exceptions are not material to this case.

For the purpose of ascertaining who was the occupier, either for the H purposes of the Act or for those of the regulations which I have just read, it is necessary to look into the position somewhat closely. First of all I deal with the Act. Before proceeding to execute repairs to this vessel, and before obtaining the use of this dry-dock, the second defendants had to fill in an application form addressed to the Port of London Authority. It is called " Application for the use of a dry-dock," and is primarily applicable to a request on the part of the owners of a ship, but the word " owners " has been struck out and " repairers " substituted, so that it reads as follows :

> The repairers [the second defendants] of the s.s. Deido hereby apply for the use by such vessel of a dry-dock, preferably the Millwall Dry-dock after s.s. El Condado (or as soon thereafter as a dry-dock is available) for — days under the regulations and conditions issued by the Authority, as stated on the back hereof . . . A

Then the dimensions of the vessel are given, and the document is signed on behalf of J. Russell & Co., the name of the owners of the vessel, Elder Dempster Lines, Ltd., being inserted as well. Then at the bottom of the first page these words appear : B

> Special attention is directed to the regulations and conditions printed on the back of this form.

On the back of the form there are the words :

> Regulations and conditions for the use of the Authority's dry-docks and appliances in connection therewith. C

Then follow 34 separate clauses. That application having been made, the second defendants were given the use of this particular dry-dock for the purposes of the repairing of the Deido, and I am satisfied that they used the dock on the terms and conditions contained in this document, which must be regarded as having been accepted by them as regulating D the position between themselves and the Port of London Authority. Many of these regulations have been referred to in the course of this case for various purposes. I do not propose to read them all, but sometimes they speak of the use of a dry-dock and at other times they use the word " occupation." Reg. 3 provides as follows : E

> The use of a dry-dock is granted to vessels as far as possible in rotation according to their order in the entry book which shall be kept by the dock and traffic manager of the Authority. Precedence may be given to vessels in a damaged condition or in any circumstances which in the opinion of the Authority necessitate their immediate admission to a dry-dock, but any vessel admitted in such circumstances shall only be entitled to the temporary use of the dock for the purpose of being F put into a fit state to await in safety her turn for more extensive repairs, if needed, in which case a second booking will be required. The Authority reserve the right of giving priority in the use of any dry-dock to the vessel of a company or firm habitually occupying discharging or loading berths in the docks of the Authority, and of declining to dock any vessel for repairs or work which may necessitate a lengthened occupation of a dry-dock.

Reg. 4 provides as follows : G

> The rate shall not include any right of exclusive occupation of a dry-dock if in the opinion of the Authority the remainder of the space in such dry-dock can be utilised. When two or more vessels next in order of rotation cannot be accommodated together in a dry-dock the Authority may alter the order of rotation and admit with the first vessel a vessel or vessels occupying a lower place in the order of rotation in the entry book if capable of being accommodated in a dry-dock H simultaneously with the first vessel.

Reg. 9 provides as follows :

> Immediate notice must be given in writing by the owner to the Authority whenever circumstances which were not known when the application for admission was made shall be discovered in connection with any vessel which has been placed in a dry-dock and which will necessitate the vessel remaining in the dry-dock for a

> longer period than the time for which she was booked. When such notice has been given, the Authority will endeavour to meet the necessities of the case, subject to these regulations and to the payment of the proper charges, but if one prolonged occupation of the dry-dock can and should in the opinion of the Authority be avoided by the vessel being undocked and re-docked, such course is to be pursued at the risk and expense of the owner, in which case a second booking will be required.

A Reg. 10 provides as follows :

> When two or more vessels occupy a dry-dock at the same time and the owner of any of such vessels desires to extend the period for which his vessel may have been entered the Authority may open the gates for another vessel to leave or enter the dry-dock . . .

Reg. 26 provides as follows :

> B The use of the dry-docks is granted on the condition that the owner shall comply with the regulations of H.M. Customs and of the Fire Offices Committee and with any bye-laws and regulations of the Authority for the time being in force.

There have been laid down in *Smith* v. *Cammell Laird & Co., Ltd.* (1) the matters which are proper to be taken into consideration in C determining this question of who is the occupier. In that case, the court was considering who was the occupier of a shipyard, and not who was the occupier of a dry-dock, it is to be observed. Nevertheless, in considering this question of occupation, LORD ATKIN uses these words, at p. 390 :

> D It was said that to construe this clause as imposing the absolute duty on the occupier in this case leads to such an unreasonable result as to throw doubt upon such a construction. My Lords, I cannot agree. The occupiers of a shipbuilding yard, as are the respondents in this case, have complete control over their yard, and can impose their own conditions upon those who enter the yard, and use either their own plant or that of the occupiers of the yard. They can insist upon the plant being constantly maintained in a safe condition, can terminate the licence E to enter the premises or use the plant in case of breach, and can take any indemnities they think fit. In this particular case, the respondents constructed the staging. It appears that, for the use of their own men, they took the very precaution which was necessary to avoid the play of the planks by lashing them to the bearers.

Later, LORD WRIGHT says, at p. 397 :

> F The "occupier" on whom the duties under Parts I to VIII are imposed is not defined, but it is, I think, clear that what is meant is the occupier of the yard as a whole, who are, in this case, the respondents. This is confirmed by the specific exception of the person who contracts to repair a vessel in a public dry-dock. Such person is "deemed" to be the "occupier," as contrasted with the person having the general management and control of the dock, and there are express provisions that certain duties should rest on that person, just as certain other duties are imposed also on the shipowners. It is thus manifest that special provisions are G needed to shift the responsibility from the owner or letter of the dock, who would be the occupier of the dock if it were not a public dry-dock. Apart from that provision, it is, I think, clear that, though the regulations do not define the occupier any more than does the Act, they contemplate one single occupier of the whole shipyard.

That was a case of shipbuilding, and not of ship-repairing, it is to be H noticed. I think that this case shows that I have to look at the substance of the matter according to the circumstances of the case. The word "occupier" is not defined in the Act. The Port of London Authority grant the use of their dry-dock for varying periods, no doubt, to numbers of shipowners and ship-repairers on the terms of those conditions, some of which I have read. It appeared in evidence that, if the second defendants had been minded, or had desired, to execute repairs to these steps, the Port of London Authority would not have allowed them to do so. I think that the Port of London Authority were the occupiers of this dry-dock for the purposes of the Factories Act, 1937. I think that they granted to the second defendants the right to use this dock on the terms and conditions laid down in that application form, and subject to the payment of the rates and rent which are prescribed by their regulations.

I do not think that it is conclusive if one finds that the word "occupation" is used sometimes in the clauses of this document. Nor do I think that it is conclusive that the word "use" of the dock is sometimes used. Similarly, the fact that the word "rent" is used affords no guidance. Nobody suggests that the relationship of landlord and tenant existed between these two parties. I think that the true position is that they were granted permission or licence to use the dry-dock for the purposes of repair on making certain payments, and that the Port of London Authority throughout retained possession and control of the dry-dock, and were at all times the occupiers. It is said that so to hold may result in the Port of London Authority's being held liable under the Factories Act, 1937, for breaches of duties which it would be unreasonable to suppose the legislature intended to put upon such a body. Sect. 14, for example, provides as follows:

> (1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . .

There are numerous other provisions applicable, no doubt, in the case of ship-repairing, to the work being carried out by the ship-repairers, but to hold that the second defendants were the occupiers would equally lead to results which might appear to be unintended by the framers of this Act. I think that the real answer is to be found in the opinion of Lord Atkin in the passage which I have already read from *Smith* v. *Cammell Laird & Co., Ltd.* (1), from which it appears that the Port of London Authority have the right to impose on the persons to whom they grant the use of this dry-dock any terms and conditions they think proper, and can protect themselves in that way. However that may be, and whatever the results may be, in my view, looking at the whole of the circumstances of the case, I hold that the Port of London Authority, and not J. Russell & Co., were the occupiers of this dry-dock for the purposes of sects. 25 and 26.

With regard to Parts I to VIII of the regulations, as I have already stated, there is there a provision that, when a ship is being repaired in a public dry-dock, the person who contracts with the owner of a ship or with his agent to execute the work of repair shall be deemed to be the occupier for the purpose of Parts I to VIII. It is quite clear, therefore, that in this particular case—a case of ship-repairing—the Port of

London Authority are not the occupiers for the purpose of those particular regulations contained in Parts I to VIII, which apply only when a ship is being repaired in a public dry-dock, and when the person who contracts with the owner of the ship or with his agent to execute the work is the person who is deemed to be the occupier. Therefore, in the case
A of ship-repairing in a public dry-dock, there is what has been described in *Smith* v. *Cammell Laird & Co., Ltd.* (1) as a notional occupier for the limited purpose, and it is clear that for that limited purpose the occupiers were J. Russell & Co. They were the notional occupiers for the purpose of these regulations, which include reg. 1, which provides as follows:

B
> Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment.

It might appear curious that there should be different occupiers for the purposes of the statute and for the purposes of the regulations, but I do not think that that really is the case, because most of these regulations apply-
C ing to the ship-repairers are dealing with matters which are primarily the concern of the ship-repairers. It so happens, however, that one of these regulations deals with a matter which might be thought to concern the persons who provide the dock. It deals really with the same subject-matter as that of sect. 26 of the Act, and I think that the result
D of sect. 26 of the Act and of these regulations is that, as regards the provision of safe means of access, by the Act liability is put upon the Port of London Authority, whereas under the regulations it falls upon J. Russell & Co. The result is that, if the Port of London Authority, as occupiers under the Act, have not complied with the duty laid upon
E them under sect. 26, then, and then only, it becomes the duty of the ship-repairers to provide safe means of access. That is to say, it is their duty either to see that the existing means of access is made safe or to provide some other safe means of access. I do not think that there is anything peculiar in that liability being put, in the first instance, upon
F the Port of London Authority, and, secondly, on the ship-repairers, if they find that safe means of access have not in fact been provided by the persons who have given them the use of the dock.

The result, therefore, is that I hold that the Port of London Authority have failed in their statutory duty under sects. 25 and 26, and that the
G second defendants have failed in the statutory duty which is put upon them under Part I of these regulations. It is not disputed, of course, that the plaintiff is a person who is entitled to the benefit of these regulations in a civil action. That being so, I do not propose to deal with the claim which has been put forward on the basis of negligence at common
H law. It is sufficient for the purposes of my decision that I hold that there have been these breaches of these statutory duties.

The Port of London Authority say, however, that the plaintiff has been guilty of contributory negligence, which deprives him of the right to recover. The second defendants in their pleading have not relied upon a plea of contributory negligence, and I think that accordingly they are not entitled to put forward that plea on the trial of this action. However, as I say, the Port of London Authority have relied upon it, and it is set out in their defence. Under para. 6 they allege contributory negligence, and they give particulars as follows:

> On or about Nov. 5, 1938, the plaintiff was using the steps in the said dock when he conducted himself so carelessly and negligently and with such complete disregard A for his own safety that he fell from one of the said steps into the said dock which is the matter complained of. The plaintiff was further negligent in that: (*a*) He failed to keep a proper or any look-out. (*b*) He failed to make proper or any use of the hand-rail provided at the side of the said steps. (*c*) Well knowing that it was, or might be, unsafe so to do he stood upon or alternatively, for the purpose of descending the said steps, used the extreme outer edges of the said steps or of some or one of them. (*d*) He stood upon, or alternatively, stepped so close to the B extreme outer edge of the said steps or of some or one of them that he was unable to obtain a proper foothold. (*e*) He stood upon or, alternatively, stepped so close to, the extreme outer edge of one of the said steps that he failed to retain his balance. (*f*) He slipped on one of the said steps and fell from the same.

In *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (2), the House of Lords have approved what was said by LAWRENCE, J., in *Flower* v. C *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (3). LAWRENCE, J., in dealing with a plea of contributory negligence against a workman in circumstances such as arise in the present case, said, at p. 140:

> I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take D into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

Applying that test to the conduct of the plaintiff in this case, I ask whether an ordinary prudent workman would have taken more care than the plaintiff took in this case. E

These steps were not provided as one-way steps. It was the normal and proper and permissible user of them that persons should pass each other going up or down. If two persons pass on these steps, one of them has to go to the outer edge, and, if he goes to the outer edge in the vicinity of the particular steps in question, he comes near the part which I have F described as being ruinous. The plaintiff has sworn (and I accept his evidence) that he was not aware of the fact that the particular step on which he trod was going to give way under him. That is to say, he was not aware that a piece of loose material was going to come away under his feet. It was obvious to him that the steps were in bad repair—namely, in G the condition shown in the photograph—but he had to use them. He had to go down them, and he had to put his foot somewhere. He was temporarily on the outside position, and he was not aware that the portion of the step upon which he was going to put his foot, and upon which he quite properly put his foot, was going to give way under him. H I am certainly not prepared to hold that he was guilty of any conduct other than that of an ordinary prudent workman using these steps in the course of his work. Accordingly, I am not surprised that, when the second defendants came to put in their defence in this case, they did not rely upon a plea of contributory negligence.

That being so, the plaintiff is entitled to recover against both defendants, and counsel for the second defendants says that the second defendants are entitled to complete indemnity against the Port of London Authority for the damages which the former have to pay to the plaintiff. That case is contained in the statement of claim in the third-party proceedings, and it is put forward in this way in paras. 4 and 5:

> 4. It was an implied term or condition of the said agreement and the third parties impliedly warranted that the third parties had and/or would before the occupation of the said dry-dock by the defendant company comply with all statutory requirements in respect of the same and that the said dry-dock would be as safe as reasonable care and skill could make it.
>
> 5. It was further an implied term or condition of the said agreement that the third parties should indemnify the defendant company against any damages or costs for which they might be liable or any expenses they might incur by reason or arising out of or in connection with any defect and/or danger in the condition of the said dry-dock.

As counsel for the Port of London Authority has pointed out, those two paragraphs are based on contract, and on contract alone. They are based upon an alleged implied term which is to be incorporated in the contract between the parties. I have already in another connection referred to the application form, which, in my view, forms part of the contract between the two defendants, but I refer to it again in connection with these third-party proceedings, because it is to be observed from the heading of the conditions that they are:

> Regulations and conditions for the use of the Authority's dry-docks and appliances in connection therewith.

In dealing with the matter, the parties have laid down in reg. 21 what is to be their position with regard to blocks, shores and stage-planks or painting-trestles. I need not read the clause, but provision is made for blocks, breast-shores, bilge-shores, stage-poles and planks. Those are to be provided by the Authority:

> The Authority will also provide a gangway for communication with the shore for the use of pedestrians only. Such gangway will be under the control of the master of the vessel, and must not be used for any other purpose. The owner must satisfy himself as to the number, soundness and suitability in all respects of the blocks, shores, stage-planks, trestles or gangways provided in the dock for his vessel, as the Authority do not accept any responsibility in any circumstances for any loss or injury arising out of or in connection with the use thereof or give or imply any guarantee in respect of the strength, soundness or suitability of the gangways, plant, materials, etc., provided.

Reg. 31 provides as follows:

> The owner of a vessel using the Tilbury New Dry-dock shall be liable for and agrees to indemnify the Authority in respect of any loss, damage or injury, howsoever caused, to or by the leading-in girder and the hydraulic bilge-blocks therein and the men provided by the Authority for the working thereof shall be deemed to be the servants of the owner.

Reg. 32 provides as follows:

> The Authority shall not be liable for any loss, damage, delay or detention whether occasioned by the neglect of their officers and servants or otherwise (*a*) which may be sustained [in certain circumstances].

Reg. 33 provides as follows:

> The men provided by the Authority to work any crane hired from the Authority shall be deemed to be the servants of the owner, who shall be liable for and agrees

> to indemnify the Authority in respect of any loss, damage or injury howsoever caused to or by any such crane.

Therefore, it must be taken that the parties, in entering into this contractual relationship, had to consider a number of matters which might arise as between themselves with regard to the liability in connection with the appliances, and generally in connection with the user of this dock. Having notionally, at any rate, applied their minds to the matter, they have inserted in this contract certain specific provisions with regard to a number of those matters. It is said, however, that I ought to incorporate a further regulation, and/or two further regulations, in the terms of paras. 4 and 5 of the statement of claim in the third-party proceedings. I can do so, if it is necessary so to do, only for the purpose of giving some business efficacy to this contract. Furthermore, I must be satisfied that, if the matter had in fact been brought to the minds of the parties to the contract, they would both have agreed that such a clause must form part of the contract, and the condition must be that such clause was not inserted because it was obvious that it must be implied, and it was really quite unnecessary to put it in, or because, if the matter had been brought to the notice of the parties, they would have said : " Of course, such a clause must be inserted."

Whatever may be the position in tort, and whatever may be the legal position when a person takes a seat at a theatre, or goes to a hotel, where there is no specific contract entered into between the parties, in the circumstances of this particular case, in which the second defendants, who, the evidence shows, knew this dock, and had worked there before, make an application in the form in which this application is made, which contains a number of terms and conditions which form part of the contract, I am not prepared to hold that I must imply a further term either as set out in para. 4 or still less as set out in para. 5 of the statement of claim in the third-party proceedings.

Accordingly, I think that the claim by the second defendants for complete indemnity from the Port of London Authority fails. Nevertheless, by virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935, it is now open to me, in a case such as this, if I am asked so to do by one or more of the defendants, to decide what contribution, if any, there shall be between the defendants, both of whom I have found to be liable to the plaintiff. Sect. 6 (2) of that Act provides as follows :

> In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage . . .

Those words are very wide, and provide that the court may do what is just and equitable, having regard to the extent of the person's responsibility for the damage. It may appear curious to decide that the responsibility of one person who has committed a breach of a statutory duty laid down by Act of Parliament is in any way different from that

of another person who has committed a very similar breach of statutory duty imposed by regulation made under, or confirmed by, the Act of Parliament, but in this case I have held that the Port of London Authority were the occupiers of the dock in substance, and that the second defendants were merely notional occupiers under the regulations
A for a limited purpose. Having regard to all the circumstances of this particular case, bearing in mind that I am dealing with a stairway down the side of the dock itself, forming an integral part of the dock, which was at all times within complete control of the Port of London Authority, that they were the persons who recognised it as being their duty to inspect
B and repair from time to time, and that they were the persons who in fact would not allow the second defendants to come and carry out any repairs to those steps, I feel that the responsibility in truth and in fact of the Port of London Authority is considerably greater than that of the second defendants. Doing the best I can, I think it just and equitable
C that the proportion of the liability which should be borne by the Port of London Authority is three-quarters and that by the second defendants is one-quarter.

I assess the damages at £3,355 11*s.* 3*d.*, including the agreed special damage, for which sum there will be judgment against both defendants.
D The basis of contribution as between the two defendants I have already fixed.

Judgment for the plaintiff against both defendants for £3,355 11*s.* 3*d.* *and costs.*

E Solicitors : *Shaen, Roscoe, Massey & Co.* (for the plaintiff) ; *Hubert Le Mesurier*, Solicitor to the Port of London Authority (for the first defendants) ; *Blount, Petre & Co.* (for the second defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

F

SEVIOUR *v.* SOMERSET COLLIERIES, LTD.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 16, 1940.**]

G *Workmen's Compensation—Arising out of and in the course of the employment—Act contrary to statutory provision and employers' regulations—Mine-worker riding on tub—Workmen's Compensation Act,* 1925 (c. 84), *s.* 1 (2).

H The workman, a lad of 19 employed as a carting-boy, stated that he was walking along a haulage road when he was struck by a tub and injured, but the county court judge found that he was riding on the journey. It was proved that workmen frequently walked along the road when the rope was travelling, in contravention of the Coal Mines Act, 1911, s. 43, and of the employers' regulations. The question was whether, having regard to the breach of the statutory provision and the employers' regulations, the workman was acting within the sphere of his employment at the time of the accident :—

HELD : having regard to the Workmen's Compensation Act, 1925, s. 1 (2), the accident arose out of and in the course of the employment.

[**EDITORIAL NOTE.** An act is not outside the sphere of employment simply because it is reckless, dangerous and forbidden. If it is shown to be for the purpose of, or in connection with, the employer's trade or business, then the workman's right to compensation is saved by sect. 1 (2) of the Act of 1925.

AS TO FORBIDDEN ACTS, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 79-95; and FOR CASES, see DIGEST, Vol. 34, pp. 297-304, Nos. 2471-2512.]

Cases referred to:

(1) *Victoria Spinning Co. (Rochdale), Ltd.* v. *Matthews*, [1936] 2 All E.R. 1359; Digest Supp.; 105 L.J.K.B. 521; 155 L.T. 363; 29 B.W.C.C. 242.

(2) *Wilsons & Clyde Coal Co.* v. *M'Ferrin, Kerr* v. *Dunlop (James) & Co.*, [1926] A.C. 377; 34 Digest 301, *2499*; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; *affg.* S.C. *sub nom. McFerrin* v. *Wilsons & Clyde Coal Co., Ltd., M'Aulay* v. *Dunlop (James) & Co., Ltd.*, 18 B.W.C.C. 630, 680.

(3) *Thomas* v. *Ocean Coal Co., Ltd.*, [1933] A.C. 100; Digest Supp.; 102 L.J.K.B. 142; 148 L.T. 219; 25 B.W.C.C. 436.

(4) *Lancashire & Yorkshire Ry. Co.* v. *Highley*, [1917] A.C. 352; 34 Digest 290, *2425*; 86 L.J.K.B. 715; 116 L.T. 767; 10 B.W.C.C. 241; *revsg.* (1916), 85 L.J.K.B. 1513.

(5) *Stephen* v. *Cooper*, [1929] A.C. 570; Digest Supp.; 98 L.J.P.C. 97; 141 L.T. 300; 22 B.W.C.C. 339.

(6) *Harris* v. *Associated Portland Cement Manufacturers, Ltd.*, [1939] A.C. 71; [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434; *revsg.*, 30 B.W.C.C. 389.

(7) *Hawker* v. *Doncaster Amalgamated Collieries, Ltd.*, [1938] 4 All E.R. 577; Digest Supp.; 160 L.T. 31; 31 B.W.C.C. 472.

(8) *Reed* v. *Great Western Ry. Co.*, [1909] A.C. 31; 34 Digest 294, *2449*; 78 L.J.K.B. 31; 99 L.T. 781; 2 B.W.C.C. 109.

(9) *Noble* v. *Southern Ry. Co.*, [1939] 2 All E.R. 817; Digest Supp.

(10) *Clarke* v. *Southern Ry. Co.* (1927), 96 L.J.K.B. 572; Digest Supp.; 137 L.T. 200; 20 B.W.C.C. 309.

APPEAL by the applicant from an award given by His Honour JUDGE JENKINS, K.C., at the Frome County Court on Jan. 22, 1940.

The applicant, a lad of 19 years of age, was employed as a carting-boy at a coal face, which was 180 yds. from the shackling-point at the bottom of the haulage road. At this point, there were two easily legible notices in 1 in. lettering, stating that:

> No unauthorised person is allowed on the haulage road whilst the haulage is in motion.

At a point 400 yds. from the shackling-point, an engine-driver worked a stationary haulage engine. The shackler and driver were in communication by signal and telephone. The road rose 1 ft. in 6 ft. to the engine. The applicant said in evidence that, when he was walking up the road while the rope was travelling, he was struck and seriously injured by a journey consisting of two full tubs. Workmen frequently walked along the road when the rope was travelling, in breach of the Coal Mines Act, 1911, s. 43. Precise details of the accident could not be ascertained, but on circumstantial evidence the arbitrator found that the applicant, with his lamp lit, left the shackling-point when the rope was travelling, heard the journey following him at some distance, and had ample time to enter a manhole. The journey travelled at 2¾ m.p.h. The applicant's brother, who was following him at a little distance, was not hurt. At the place where the applicant was struck, the roof was very low. From the applicant's injuries, the arbitrator concluded that he had been riding on one of the tubs.

The county court judge accordingly found that the lad had not proved that he was hit while he was walking along the road. He rejected his evidence, and found that the accident did not arise out of the employment. He said in his judgment that the act of riding on a tub was reckless, dangerous, forbidden and entirely outside the applicant's contract of service, and that he had not discovered any authority to warrant his finding that this act arose out of the employment. It was not done for the purpose of, or in connection with, the respondents' trade or business. He distinguished between acts of simple disobedience and acts such as riding a moving journey for the sole purpose of avoiding the fatigue of walking, or leaping on to the top of a descending cage to get to the coal face more speedily. He made an award in favour of the respondents. The applicant appealed, on the grounds that the judge misdirected himself in law in holding that the accident did not arise out of and in the course of the employment, that there was no evidence upon which it was open to the county court judge to find that the act was outside the applicant's contract of employment, or not done for the purpose of, or in connection with, the respondents' trade or business, or that the applicant was riding a tub.

Malcolm McGougan for the applicant.

F. W. Beney for the respondents.

McGougan: It is not disputed that the workman was proceeding to the pit-bottom at the end of his shift. It was part of his duty to the respondents to go there at that time. The proper test to apply to such a case as this is: Was the act which the workman was performing when he met with the injury one which, apart from any prohibition, arose out of and in the course of his employment? Apart from prohibition, it was open to this workman to proceed from the coal face to the pit-bottom by any means he cared to adopt. The judge's description of the act as "dangerous" was irrelevant, for the fact of the prohibition must be excluded from consideration of the facts in this case. Similarly, there was no evidence to support the judge's finding that the act was outside the man's contract of employment, for it is not disputed that the workman, in proceeding from the coal-face to the pit-bottom, was doing something that he was employed to do. The judge was prepared to hold that the workman was entitled to recover if he had found that the man was walking up the haulage-way and not riding a journey, although to do so was also a breach of the statutory and the employers' prohibition. To hold that the man cannot recover because of a finding of fact that he was riding and not walking is to import into the case the doctrine of added peril, an argument which is no longer valid. The fact that the man made use of a prohibited method of proceeding is immaterial: *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (6), *Thomas* v. *Ocean Coal Co.* (3). [He was stopped by the court.]

Beney: *Noble* v. *Southern Railway Co.* (9) and *Clarke* v. *Southern Ry. Co.* (10) are on all fours with the present case. The recent decision A of the House of Lords (*Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (6)) is to be distinguished from *Noble's* case (9), *Clarke's* case (10) and the long line of cases behind them. It was open to the judge to find that the act was different in kind from anything that the workman was employed or authorised to do; or that, though B not different in kind, it had been put outside the range of the employment by a genuine prohibition.

SLESSER, L.J.: This case, as counsel for the respondents says, is of considerable importance, and we are informed that, whilst it is notorious C that many boys in coal mines do travel upon tubs, some suited and some unsuited for human conveyance, contrary to the provisions of the Coal Mines Act, 1911, yet there has been no case in this court where compensation has been claimed as the result of injuries sustained by so travelling since the recent series of decisions culminating in *Victoria* D *Spinning Co. (Rochdale), Ltd.* v. *Matthews* (1).

The facts of this case as found by the county court judge are these. The applicant was engaged to work at the Ludlow Pit as what is called a carting-boy at the coal face, which is:

> . . . situate 180 yds. from the shackling-point at the bottom of the haulage road, E at which point there are two electric lamps a few feet apart.

The case for the applicant was that he was walking along this haulage road when he was struck by a tub and injured. In so far as the county court judge has not accepted the applicant's view of what he was doing, however, that aspect of the case need not be considered. I accept the F county court judge's finding of fact as to how the accident happened. It is not necessary for me to go into the reasons why the county court judge arrived at the conclusion at which he did arrive, because he had to come to a conclusion in regard to what happened very largely on circumstantial evidence. However, he does finally come to the conclusion that G the applicant was riding on the journey. That is to say, he was riding on the tub. The county court judge, as I have said, gives the reasons why he comes to that conclusion. He came to the conclusion that the applicant was riding on the journey, and that he was riding on the journey in contravention of the Coal Mines Act, 1911, and in disobedience H to his employers' orders.

I entertain little doubt that, had it not been for the amendment of the law in 1923, under the earlier decisions of this court and of the House of Lords, it would have been open to the county court judge on the finding of fact to have come to the conclusion that this statutory and personal prohibition against riding on these tubs would have been sufficient to have taken this case outside the sphere of the employment, so that the employers could say: "We never employed you, the workman, to travel upon these tubs. Indeed, we expressly prohibited it, and the statute has prohibited it, and it is not open to you now to say that what you did was within the sphere of your employment." However, there was passed the Workmen's Compensation Act, 1923, s. 7, which now finds expression in the Workmen's Compensation Act, 1925, s. 1 (2), and we have to deal with the situation as it existed after that amendment of the law. I do not think any useful purpose is to be served by dealing with the views which from time to time were taken in this court as to the extent of the change which was produced by that legislation. I would rather go directly to the fountainhead of authority and see what the House of Lords has told us is to be regarded as the present law on the matter.

The cases which we have here to consider begin with the now very famous opinions in *Wilsons & Clyde Coal Co.* v. *M'Ferrin*, *Kerr* v. *Dunlop (James) & Co.* (2), which distinguished between the case of a man who was prohibited from doing an act, but was found to be doing an act within the sphere of his employment, and the case of a man who, acting under a similar prohibition, was found to be acting outside the sphere of his employment altogether. From time to time, questions arise in regard to how far the prohibitions as such can be looked at in order to see whether they have affected the sphere of the employment. The matter came up for consideration in *Thomas* v. *Ocean Coal Co., Ltd.* (3). In that case, a man had crossed the bottom of a pit shaft at a time when the cages were ascending and descending—an act prohibited by the Coal Mines Act, 1911, and notices of that prohibition were posted in the colliery. There was provided another and a proper way of getting from one side to the other of the bottom of the shaft, but the man dashed across the bottom of the shaft and was killed by one of the descending cages, and his widow claimed compensation. In that case, the county court judge found as a fact that the act was done:

> . . . for the purposes of and in connection with the employers' trade or business [a necessary finding, if the man's dependant was to take advantage of the provisions of sect. 1 (2)] but found that in committing such an act, the workman had added such a peril to the employment as to take the act quite outside the scope of his employment.

The Court of Appeal upheld the county court judge, and, taking the matter to be a question of fact, came to a conclusion similar to that to which the county court judge had come. The House of Lords, however, took a different view of the matter, and the decisions there laid down have guided this court ever since in the determination of this difficult matter. The position is put very clearly, I think, by LORD BUCKMASTER, at p. 109:

> In one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the Act contains no pro-

> visions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances. Conduct can, of course, be so reckless and so unnecessary as to take it outside the meaning of the statute. . . .

Then he referred to *Lancashire & Yorkshire Ry. Co.* v. *Highley* (4) and *Stephen* v. *Cooper* (5). Then he goes on to say that the question was whether, if there had never been a regulation forbidding what the man did, the injury which resulted was due to an accident arising out of and in the course of his employment. That is the problem he puts to himself. Then he says, at p. 110 : A

> I think, upon the whole, that it was. It arose out of his employment certainly, and was, in my opinion, in the course of it, seeing that, apart from the prohibition, the action, although hazardous, was due to the man's desire to expedite the process he was engaged to control. B

Then LORD BLANESBURGH in his opinion indicates, to my mind, very much the same thing. The final conclusion in that case, as I read it, is that, once it is shown that the act is within the sphere of the employment, the mere fact that it is prohibited as such will not take it outside the sphere of the employment, although there may be some prohibitions which of their nature are such that they indicate the limitations of the sphere of employment itself. I have only put paraphrastically what has been repeated in a number of these cases. It is important to notice, for example, that in *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (6) an even greater limitation is put upon the doctrine of added peril, which LORD ATKIN describes, at p. 77, as an "unfortunate misapplication of the expression, valuable enough in its right context, of 'added risk.'" Then he points out, dealing with *Stephen* v. *Cooper* (5) and other cases, that nevertheless [p. 79 ([1938] 4 All E.R. at p. 836)] : C D E

> Accidents happen to workmen when taking their meals or in other respects not pursuing for the moment their employment.

Then he says, at p. 79 ([1938] 4 All E.R. at p. 836) :

> The Lord Chancellor is in any case only referring to perils which the workman is obliged to encounter : but even so I think the word may be misunderstood, and the test must be—are the perils those which he in fact encounters while doing the work which he is employed or authorised to do. F

It is also interesting to observe that in that case, it having been held by the Court of Appeal that the question was one of fact, the House of Lords decided that only one conclusion in law could be drawn from the findings—namely, that the workman was injured by an accident arising out of and in the course of his employment. G

Then finally, in *Victoria Spinning Co. (Rochdale), Ltd.* v. *Matthews* (1), LORD RUSSELL OF KILLOWEN said, at p. 248 ([1936] 2 All E.R. at p. 1362) : H

> . . . after the *Ocean Coal Co.* case (3), it is no longer open to the courts to hold that because the "contravention" by the workman added a peril to the employment, the accident did not arise out of and in the course of the employment, and that consequently subsect. (2) did not apply.

In the present case, I think that it is impossible not to hold that the act here done was done in connection with the respondents' trade or business. When the county court judge came to the conclusion that it was not so done, I think that he came to that conclusion upon the assumption, with which I will deal in a minute, that the act done was done outside the sphere of the employment. Once it is assumed, however, that the act was done within the sphere of the employment, the evidence A is all one way—namely, that this man used the tub for the purpose of getting from his work at the coal face, and for no other purpose, and that, therefore, the act was done for the purpose of the employers' trade or business.

That brings me to the final question, and it is critical of the whole B decision. On the finding of fact of the county court judge that this man proceeded to the coal face in this tub—crouching on the tub, the tub being partly full—was there any evidence that this act was not an act within the sphere of the employment? I am not at all sure that I understand the reasons for the county court judge's conclusion that this act C was outside the man's contract of service. The county court judge says in his judgment:

> I have read all the cases to which my attention was drawn in argument, especially those referring to "added peril," "negligent acts," "reckless acts," and to the "splitting of acts into aspects," but I have not discovered any authority warranting my finding that one of the most reckless and dangerous acts which a miner can D perform, which he knows to be forbidden, and which is entirely outside of his contract of service, can be regarded as arising out of his employment.

He gives no reason why he came to the conclusion that it was entirely outside the man's contract, except that he expresses the view that it was "one of the most reckless and dangerous acts which a miner can perform, E which he knows to be forbidden," and he says that he comes to that conclusion not having discovered any authority to the contrary. If he has come to the conclusion that what was done was entirely outside the contract because it was "one of the most reckless and dangerous acts which a miner can perform, and which he knows to be forbidden," his F judgment is clearly the result of a misdirection. *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (6) lays it down that, if the act which the workman was doing at the time when he was injured was within his employment, no degree of recklessness in the doing of it can take it out of his employment. That is the result of the decision in that G case, and it is so stated in terms by LORD ATKIN. So much, therefore, for the "reckless" and "dangerous" act which the man is said to have committed. Similarly, the fact that he knows the act to be forbidden has already been dealt with in *Thomas* v. *Ocean Coal Co., Ltd.* (3), and also in *Victoria Spinning Co.* (*Rochdale*), *Ltd.* v. *Matthews* (1). Neither H the fact that the act is reckless nor the fact that the man knows it to be forbidden is a reason for holding that the act is outside the sphere of the employment if the evidence otherwise shows that it was within the sphere of the employment. If the county court judge has come to the conclusion that it was entirely outside his contract of service for reasons other than that it was "reckless" and "dangerous," and that it was forbidden, then, in my opinion, there was no evidence upon which he could come to that conclusion. There is no evidence that the terms of this man's contract of employment excluded from his employment travelling along this road in this way to his work, other than the fact that it was prohibited, and, if we were to allow ourselves, merely because this particular act of travelling in a tub, or in this particular class of tub, in this way was prohibited, to come to the conclusion from that, and from that alone, that this act was outside the sphere of the employment, we should be doing the very thing which possibly the Court of Appeal had been prone to do in earlier cases, and which we were told in *Thomas* v. *Ocean Coal Co., Ltd.* (3) was an illegitimate thing to do. It is said, I know, that this particular tub, or type of tub, was not appropriate for human carriage, but, where the consent in writing of the manager is given, to act in the way in which this man acted is not, under sect. 1 (2), even a breach of the regulations.

In those circumstances, it seems to me, first, that, if the county court judge has misdirected himself, as I think he has, and has come to the conclusion that this act was outside the contract of employment because it was reckless, dangerous and forbidden, he is wrong, and, secondly, if he has come to the conclusion that it was outside the contract of service apart from the considerations that it was reckless, dangerous and forbidden, then I think that there is no evidence upon which he can come to that conclusion. If the right view be that it was within the sphere of the employment, the workman is not entitled to rely upon sect. 1 (2), unless it be found that what was done was done for the purpose of, or in connection with, the respondents' trade or business. This court has power to draw inferences of fact, and it seems to me that the necessary inference of fact to draw in this case is that what was done was done in connection with the respondents' trade or business. If that is so, it would follow that, the act being within the sphere of the employment, the whole matter is covered by the protecting words of sect. 1 (2), and that, therefore, the county court judge was wrong, and that this appeal succeeds.

Luxmoore, L.J.: I agree.

Goddard, L.J.: I agree. In my opinion, on the facts which were found by the county court judge, he was constrained by the recent decisions of the House of Lords to hold that this act was one which was within the scope of the employment, and that consequently the accident arose out of—as it certainly did—and in the course of the employment. I must say that I have some sympathy with the county court judge. I see that no less than 21 cases were cited to him, all of which he says he has read, and it may well be that one would get bemused by reading all those authorities. I myself certainly have been in some danger of that. For myself, I find no assistance at all in considering cases merely because

they deal with tubs, nor do I find any assistance, or very much assistance, in considering cases which were decided before the alteration of the section in 1923. That remark applies equally to the cases which were decided before *Thomas* v. *Ocean Coal Co., Ltd.* (3), which is really a landmark in this branch of the law. *Thomas* v. *Ocean Coal Co., Ltd.* (3)
A was followed by *Victoria Spinning Co.* (*Rochdale*), *Ltd.* v. *Matthews* (1) and *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (6), and I think those cases lay down one or two principles which, if borne in mind, make this class of cases comparatively simple—much more simple, at any rate, than they were before. I ventured to say in *Hawker* v. *Don-*
B *caster Amalgamated Collieries, Ltd.* (7) that that case was reasonably clear. What one has to do is to see what the man was employed to do—find what the contract of employment was, and what he was employed to do—and then see whether he was doing something which he was not employed to do at all, or whether he was doing what he was employed to do in a
C way in which he had been forbidden to do it.

In this case, the man was employed to win coal at the coal face, which was some distance from the bottom of the shaft, and consequently an even greater distance from the pit-head. His contract with his employers necessitated his presenting himself for work at the coal
D face. He had, therefore, to get down the pit-shaft, and proceed from the foot of the pit-shaft to the coal face, in order to do his work. All the time he was going from the pit-head to the coal face, he was doing that which he was employed to do. He had to make a journey along that particular road, and he was forbidden to make that journey
E by riding on the tubs. That is a prohibition as to the way in which he is to carry out his work. If there had been no such prohibition at all, could there be any doubt that this man was acting within the scope of his employment in riding in a tub along this road? I should have thought that there could not. If that be so, it is clear that this pro-
F hibition is only a prohibition against the man doing his work in a particular way. That, I think, is what he was doing.

In *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (6), LORD WRIGHT, at p. 91 ([1938] 4 All E.R. at p. 843), quoted as usefully summarising the position the words of LORD MACNAGHTEN in *Reed* v.
G *Great Western Ry. Co.* (8):

> The problem may be compendiously stated in the words of LORD MACNAGHTEN in *Reed* v. *Great Western Ry. Co.* (8), as being whether the man at the time when the accident happened was about his own business, not about the business of his employers.

H In this case, of course, the man was not about his own business, but was about the business of his employers, because he was going to work at this particular place.

To my mind, there has been some confusion here between what the man was employed to do and the manner in which he was employed to do it. The findings of the county court judge, to my mind, show beyond question that, at the time of the accident, this man was acting within the scope of his employment, but he was carrying out that employment in a way in which he had been forbidden to do it, and, in those circumstances, I think that the judge should not have come to the conclusion to which he did come. I think that he could come to the conclusion to which he did come only by misapprehending the law which applies to the A facts which he found. Therefore, the evidence and the facts which he found obliged him to find that this man was acting within the scope of his employment at the time of the accident, and that, therefore, the man was entitled, as the accident was of a serious and permanent nature, to the protection given to him by sect. 1 (2) of the Act. I agree B that this appeal should be allowed.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors: *Arthur Taylor & Co.*, agents for *Titley, Long, Taylor & Denning*, Bath (for the appellant); *F. E. Metcalfe*, Bristol (for the C respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

END OF VOLUME 1